85-338 (1)

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

MABLE A. REDIC,

Petitioner,

vs.

DAVID S. SCHWARTZ,

Respondent.

==========

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

==========

LOUIS L. LESESNE, JR.
980 United Carolina Bank Building
212 South Tryon Street
Charlotte, N.C. 28281
704/372-5700

Counsel for Petitioner

QUESTION PRESENTED

Did the Court of Appeals exceed its authority under Rule 50, F.R.Civ.P., and the Seventh Amendment by reversing a jury verdict and holding that a directed verdict should have been granted, where that holding was based on evidence never tendered or introduced into evidence at trial, and where that holding was premised on resolving credibility disputes in favor of the moving party, even though there was circumstantial evidence supporting the jury verdict?

PARTIES

The parties to this proceeding are petitioner Mable A. Redic and respondent David S. Schwartz.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

MABLE A. REDIC,

Petitioner,

vs.

DAVID S. SCHWARTZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Mable A. Redic respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 9, 1985.

OPINION BELOW

The decision of the court of appeals, which is reported at 762 F.2d 1181, is set out at pp. 1a-27a of the Appendix. The order of the court of appeals denying rehearing, which is not reported, is set out at pp. 28a-29a of the Appendix. There was no opinion of the district court.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1985. Petitioner's petition for rehearing was denied on June 5, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

United States Constitution, Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a

jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

12 C.F.R. § 226.2(a)(17)(i):

"Creditor" means (i) A person (A) who regularly extends consumer credit[3] that is subject to a finance charge or is payable by written agreement in more than 4 installments (not including a downpayment), and (B) to whom the obligation is initially payable, either on the face of the note or contract, or by agreement where there is no note or contract.

[3] A person regularly extends credit only if it extended credit more than 25 times (or more than 5 times for transactions secured by a dwelling) in the preceding calendar year. If a person did not meet these numerical standards in the preceding calendar year, the numerical standards shall be applied to the current calendar year.

12 C.F.R. § 226.2(a)(25):

"Security Interest" means an interest in property that secures performance of a consumer credit obligation and that is recognized by state or federal law.

STATEMENT OF THE CASE

This is an action under the Truth in Lending Act (hereinafter "the Act"), 15 U.S.C. § 1601 et seq. The district court had jurisdiction under § 130 of the Act, 15 U.S.C. § 1640(e). The case arises out of a 1981 transaction in which respondent Schwartz and Gary H. Watts Realty Company lent petitioner $3000 to reinstate her mortgage, after her mortgagee had begun foreclosure proceedings. Respondent and Watts Realty charged petitioner usurious interest of 50 per cent on the loan. The loan was to be repaid in one year and was secured by a security interest in petitioner's home.

The loan documents did not, however, take the form of a loan. Respondent attempted to conceal the true nature of the

transaction and created a sham transaction by disguising the loan as a sale of petitioner's home. Petitioner executed a warranty deed to her home, and respondent "leased" petitioner's home to her for one year and gave her an "option" to repurchase at the end of the year.

Petitioner sought relief under § 125 of the Act, 15 U.S.C. § 1635, which permits a borrower to rescind a credit transaction where the creditor takes a security interest in the borrower's home. Respondent refused to rescind on the claims that (1) the transaction with petitioner was not a loan and (2) he was not a "creditor," as defined by the Act. The jury resolved both issues in petitioner's favor as to respondent Schwartz, and the district court entered judgment allowing rescission and other relief under the Act, along with damages for a pendent usury claim.

The court of appeals affirmed the jury verdict that the transaction with petitioner was a usurious loan with a security interest (22a), but it reversed the jury verdict that respondent Schwartz was a creditor,[1] and held that the district court should therefore have granted his motion for directed verdict on the Truth in Lending claim (25a).

A "creditor" is one who "regularly" extends credit. 15 U.S.C. § 1602(f). The Act does not define "regularly," but Federal Reserve Board Regulation Z establishes a numerical test: a person is a creditor if he extends credit secured by

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[1] Watts Realty did not participate in a sufficient number of transactions to be found a creditor, and its directed verdict motion was allowed by the district court. The district court allowed relief under the Act solely against respondent Schwartz.

a dwelling five times during the preceding year. 12 C.F.R. § 226.2(a)(17)(i), fn. 3.

Respondent in 1981 engaged in 12 other transactions having the same format as the loan to petitioner. In each, homeowners facing foreclosure signed deeds, purporting to sell their homes to respondent, and leases with an option to repurchase at the end of the lease term. The jury found that at least five of these 12 transactions were, like the transaction with petitioner, loans with a security interest, disguised as sales, and that respondent was a "creditor" under the Act.

A transaction recognized under state law as a loan with a security interest is also a credit transaction and security interest under the Act. 12 C.F.R. § 226.2(a)(25). North Carolina law makes the true character of such transactions

dependent on the parties' intent, not on the form of the documents. Intent must be determined, not from what the parties say their intent was, but from the objective facts and circumstances surrounding the transaction.

Petitioner showed at trial that all 12 transactions were characterized by objective factors recognized under state law as being inconsistent with a sale and therefore supporting the verdict that the parties' intent was to make a loan rather than a sale: (1) the putative grantors were in financial distress; (2) the putative grantors were allowed to remain in possession of the premises; (3) consideration for the alleged sales was inadequate; and (4) the so-called lease agreements imposed on the putative grantors, as "tenants," obligations which state law imposed on the landlord in a

true landlord-tenant relationship.

There was also direct evidence at trial from three of the 12 so-called grantors (along with petitioner) that their intent was to make a loan. Four putative grantors testified for respondent at trial that their intent was to sell their property. The six remaining grantors did not testify at trial.[2] Respondent testified that all 12 transactions were sales and that he had never extended credit secured by a dwelling.

The Court of Appeals held that the jury was not free to credit petitioner's circumstantial evidence which was inconsistent with a sale and that the jury could not disbelieve respondent's evi-

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[2] The apparent discrepancy is accounted for by one witness' testifying inconsistently that the parties' intent was both to make a loan and a sale.

dence as to any particular transaction if both parties to that transaction testified that it was their intent to effect a sale (24a).

It then held, relying on affidavits from putative grantors which were never introduced at trial, that such conclusive evidence had been adduced in a sufficient number of transactions to make it impossible for petitioner to show the requisite five transactions (23a-25a). Consequently, it reversed the award of relief under the Act.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit decision manifests a continuation of that court's disregard of the limited role of appellate review of a jury's factual determinations. This Court only recently reviewed, in a non-jury context, the Fourth

Circuit's misapprehension and misapplication of the clearly erroneous rule under Rule 52, F.R.Civ.P. Anderson v. City of Bessemer City, 470 U.S. ___, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

This case represents an even more dramatic incursion into the fact-finding process, since appellate review of jury verdicts under Rule 50, F.R.Civ.P., is even more circumscribed than is the review of non-jury findings of fact under Rule 52. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Case v. Morrisette, 475 F.2d 1300, 1306 (D.C. Cir. 1973). Reversal of the jury verdict represents an infringement on petitioner's Seventh Amendment right to jury trial. Atlantic & Gulf Stevedores Inc. v. Ellerman Lines Ltd., 369 U.S. 355, 360 (1962). Because of the importance of the jury's role in the fact-finding process and its firm place in our

jurisprudence, "any seeming curtailment of the right to a jury trial should be scrutinzed with the utmost care." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959).

The Fourth Circuit's willingness to review, de novo, the jury's factual findings, to resolve credibility disputes in favor of the party moving for directed verdict, and to base those credibility resolutions on evidence not even introduced at trial, without ever even mentioning or invoking the applicable test under Rule 50, represents such an irregular and unprecedented deviation from the accepted and usual course of appellate review of the sufficiency of the evidence supporting a jury verdict that the writ should issue to review the decision.

The court's opinion is flawed by two

independent infirmities, either of which furnishes a basis for review.

I.
THE COURT OF APPEALS IMPROPERLY RESOLVED CREDIBILITY DISPUTES WHICH MUST BE LEFT TO THE JURY

The critical issue for decision by the jury was one of intent, a pure question of fact. Pullman-Standard v. Swint, 456 U.S. 273, 287-288 (1982). The court of appeals held that the jury was required to believe direct evidence from both parties to a particular transaction that the parties' intent was to sell the property (24a), even though petitioner adduced circumstantial evidence which would support a contrary finding and even though the substantive rule is that such direct evidence is not only not conclusive but is insufficient to support a finding of intent. O'Briant v. Lee, 214 N.C. 723, 731, 200 S.E. 865, 870 (1939); Hodges v. Hodges, 37 N.C.App. 459, 468,

246 S.E.2d 812, 817 (1978). Intent must be proved by objective facts and circumstances outside the deed, inconsistent with the idea of an absolute deed. Ricks v. Batchelor, 225 N.C. 8, 11-12, 33 S.E.2d 68, 70 (1945); McKinley v. Hinnant, 242 N.C. 245, 251, 87 S.E.2d 568, 573 (1955). Any doubts about the nature of the transactions should be resolved in favor of a loan and mortgage, rather than a sale. O'Briant v. Lee, supra.

The court of appeals acknowledged the above rules (18a-21a) and never questioned the sufficiency of the circumstantial evidence supporting the verdict. It instead held that direct evidence of intent was conclusive, and the jury could not disbelieve such direct evidence in favor of circumstantial evidence sup-

porting a contrary result. (23a)[3]

The standard to be applied in ruling on motions for directed verdict is familiar and well established: The court must resolve all credibility disputes in favor of petitioner, as the non-moving party, it must view the evidence in the light most favorable to the non-movant, and it must give the non-movant the benefit of all inferences which the evidence fairly supports, even though contrary inferences might be drawn. Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 696 (1962); Lavender v. Kurn, 327 U.S. 645, 653 (1946).

The court of appeals stood this rule

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[3] The Fifth Circuit has characterized a similar claim -- that circumstantial evidence cannot support a verdict where countered by direct evidence -- as "so lacking in merit that it does not require discussion." Lindsey v. Board of Regents, 607 F.2d 672, 675 (5th Cir. 1979).

on its head. Indeed, it is significant that the Court never referred to the rule or attempted to explain why the inferences arising from petitioner's evidence would not support the verdict. It failed to focus on the sufficiency of the evidence supporting petitioner's position, see Wilkerson v. McCarthy, 336 U.S. 53, 63 (1949), and instead looked solely at the evidence supporting the moving party's position.

It then compounded its error by resolving credibility disputes in respondent's favor. Even if respondent's mere assertions of intent could support a finding of intent to make a sale -- a dubious proposition under state law -- they can hardly compel such a finding. It is the function of the jury, not the court, to weigh the contradictory inferences and to determine which is more

persuasive. Continental Ore Co. v. Union Carbide Corp., supra, 370 U.S. at 701; Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 35 (1944).

In holding that the jury was not free to credit circumstantial evidence supporting an inference contrary to the direct evidence, the court of appeals denigrated circumstantial evidence to a position inferior to that of direct evidence, when in fact one is intrinsically no different from the other, and either may sustain the jury's verdict. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714, n. 3 (1983); Holland v. United States, 348 U.S. 121, 140 (1954); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-267 (1977). Indeed, proof of intent can sometimes only be proved by circumstantial evidence. Eastern States Retail Lumber

Dealers Ass'n. v. United States, 234 U.S. 600, 612 (1915).

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.

Washington v. Davis, 426 U.S. 229, 253 (1976)(Stevens, J., concurring).

The court's function in ruling on Rule 50 motions is limited to determining whether the non-movant's evidence was sufficient to support the verdict. The court implicitly recognized the sufficiency of petitioner's evidence. The fact that it might have found the direct evidence more persuasive is meaningless, as this decision is left to the jury, to determine which version of the facts is more persuasive. Lavender v. Kurn, supra, 327 U.S. at 653.

II.
THE COURT OF APPEALS BASED ITS DECISION ON EVIDENCE NEVER INTRODUCED AT TRIAL

The Court of Appeals further compounded its error by accepting as true and not subject to dispute affidavits never tendered, much less introduced, at trial.[4] Indeed, even respondent did not argue on appeal that the affidavits in question should have been considered in connection with the directed verdict motion. The court nonetheless held that the district court was required to consider these affidavits in ruling on the

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[4] The affidavits had been simply tendered in connection with summary judgment motions. The court's explicit reference to error in not granting the directed verdict motion (25a) and its treatment of the pendent claim (26a-27a) dispel the respondent's anticipated claim that the court's decision is in actuality a ruling on his summary judgment motion.

directed verdict motion.

This unprecedented irregularity was an integral aspect of the court's decision. The Court held that respondent offered conclusive evidence of intent from both parties in a sufficient number of transactions that the jury could not find that five or more of the 12 transactions were loans (24a-25a). However, in 9 of the 12 transactions the putative grantor either did not testify at trial or testified that the parties' intent was to make a loan. Only four putative grantors testified at trial that they intended to sell their home.

The court's rule crediting the movant's evidence and holding that direct testimony of intent to make a sale could not be disbelieved would not have resulted in reversal had the court limited application of rule to evidence introduced at trial. Only by relying on the

affidavits of additional putative grantors whom respondent did not even call as witnesses at trial did the court of appeals find a sufficient number of transactions to support its decision.

It requires no citation of authority to show that the function of a directed verdict motion is to test the sufficiency of the evidence heard by the jury. The opinion inexplicably deviates from this rule and relies on evidence which respondent never even offered at trial and which was never heard by the jury. Requiring a district court to consider such evidence which even the moving party has not sought to introduce or rely upon wreaks havoc with the usual procedure for considering such motions.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

Louis L. Lesesne, Jr.
980 United Carolina Bank Building
212 South Tryon Street
Charlotte, N.C. 28281
704/372-5700

Counsel for Petitioner

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1393(L)

MABLE A. REDIC,

Appellee,

versus

GARY H. WATTS REALTY CO., AND
DAVID S. SCHWARTZ,

Appellants,

and

SHIRLEY E. SCHWARTZ,

Defendant.

No. 84-1523

MABLE A. REDIC,

Appellee,

versus

GARY H. WATTS REALTY CO.,
DAVID S. SCHWARTZ,

Appellants,

and

SHIRLEY E. SCHWARTZ,

Defendant.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge. (C/A 82-0777).

Argued: January 8, 1985
Decided: May 9, 1985

Before
RUSSELL and CHAPMAN,
Circuit Judges,
and
HAYNSWORTH,
Senior Circuit Judge

Ralph C. Clontz, Jr. (Clontz and Clontz on brief) for appellants; Louis L. Lesesne, Jr. (Gillespie & Lesesne on brief) for Appellee.

CHAPMAN, Circuit Judge:

This appeal arises out of a real estate transaction between plaintiff-appellee, Mable A. Redic, and defendants-

appellants, Gary H. Watts Realty Company, a corporation, and David S. Schwartz, a sole proprietor. The defendants appeal from the judgment of the district court, entered after a jury verdict, awarding Redic damages against Schwartz under both the Truth in Lending Act, 15 U.S.C. § 1601 et seq. (1982), and North Carolina's usury statute, N. C. Gen. Stat. § 24-2 (1965), ordering the defendants to reconvey the property to her, and awarding Redic her counsel fees and costs. We conclude that the district court erred in denying Schwartz' motion for a directed verdict as to Redic's Truth in Lending claim because the evidence conclusively showed that Schwartz was not a "creditor" within the meaning of the Act. Accordingly, we reverse that portion of the district court's decision awarding Redic relief under the Truth in Lending Act but

affirm that portion of the decision awarding her damages against Schwartz under North Carolina's usury statute.

I

Redic purchased her home in 1974 from the Department of Housing and Urban Development. Lomas & Nettleton Company, a mortgage loan company located in Virginia, held a deed of trust which secured a FHA loan. Due to a series of financial difficulties in 1981, Redic went into default on her monthly mortgage payments and, in December 1981, Lomas & Nettleton initiated a foreclosure action.

In an effort to save her home, Redic inquired of a number of potential lenders about obtaining a loan in order to bring her mortgage account current. Redic was at that time a participant in a Chapter 13 wage earner plan in the bankruptcy court. While Redic was seeking a loan at

traditional lending institutions, several real estate investors made unsolicited offers to purchase her equity in the home. One of these investors was David Schwartz. On December 23, 1981, Redic, Schwartz, and Watts Realty Company entered into the transaction which is the subject of this action.

The parties disagree over the nature of the transaction. According to the defendants, Schwartz and Watts Realty Company purchased Redic's equity in her home for $17,100, leased it back to her for a year, and gave her an option to repurchase it at any time within a year for the sale price plus a realtor's commission of 3.5 percent. Schwartz denied that he had discussed making a loan to her and insisted that he had only discussed purchasing her home. Redic claims that Schwartz offered to lend her the

necessary funds to bring her mortgage current and to allow her one year in which to repay the amount lent. Redic insists that despite the parties' intention, the closing documents prepared by the defendants consisted of a general warranty deed, a lease, and an option to repurchase. Redic contends that the transaction was a loan with a security interest, rather than a sale with an option to repurchase, notwithstanding the form of the documents.

Redic was unable to repay or repurchase at the conclusion of the one year period and Schwartz refused to extend the time. Redic then gave the defendants notice that she was rescinding the transaction pursuant to § 125 of the Truth in Lending Act, 15 U.S.C. § 1635(a). The defendants did not respond to Redic's notice of rescission.

Redic then filed this action in the district court under the Truth in Lending Act. Redic alleged that the transaction in question was a loan with a security interest, rather than a sale with an option to repurchase, and that the defendants had failed to comply with the disclosure requirements contained in the Truth in Lending Act. Redic also asserted a pendent claim under North Caolina law, claiming that the defendants had charged her usurious interest in violation of N. C. Gen. Stat. § 24-2 (1965). Accordingly, Redic sought (1) a civil penalty of $1,000 plus costs and attorney's fees, (2) rescission of the transaction under the Truth in Lending Act and Revised Regulation Z and a refund of any finance and other charges paid, and (3) damages under North Carolina's usury statute. Redic alleged jurisdic-

tion under § 130 of the Act, 15 U.S.C. § 1640(e).

The defendants denied that the transaction in question was a credit transaction or that they were "creditors" under the act. The defendants insisted that they were not "creditors" within the meaning of the Act because they had not "regularly" extended consumer credit. The defendants acknowledged, however, that they made no disclosures under the Act and that they had not rescinded the transaction.

During 1981 Schwartz entered into twelve similar transactions with other homeowners. Each transaction followed a similar format as that followed in Redic's case: execution of a warranty deed with a lease and an option to repurchase at the end of the so-called lease. At trial Redic contended that these other

transactions also represented extensions of credit, and that Schwartz was therefore a "creditor" within the meaning of the Act.

In each of the other twelve transactions Schwartz approached the putative grantor after learning that the grantor was facing foreclosure proceedings on his home. Each lease agreement required the putative grantor/tenant to maintain the interior and exterior of the premises. In each transaction the homeowner was allowed to continue in possession of the premises and was given an option to repurchase at the end of the lease. Although Schwartz entered into twelve similar transactions during 1981, Watts Realty Company was a party to only one of those transactions.

Both sides moved for summary judgment. In support of their motion for

summary judgment, the defendants submitted the unrefuted affidavits of the grantors in eight of the twelve relevant transactions. In these affidavits each grantor swore that he (1) sold his home to Schwartz, (2) rented his home from Schwartz (for varying terms with some leases renewed), (3) received an option to repurchase which he was not obligated to exercise and had cancelled, (4) never requested or received a loan from either defendant, and (5) knew that he had absolutely sold his property to Schwartz. Redic's evidence opposing the defendants' motion for summary judgment consisted of affidavits and a deposition from parties involved in only four of the twelve relevant transactions. She also filed her counsel's affidavit to introduce some of the documents executed by the parties to the other eight trans-

actions, which evidence corroborated the affiant's testimony. The district court denied both motions for summary judgment.

The case was tried before a jury. At the conclusion of the evidence, the district court granted Watts Realty Company's motion for directed verdict with respect to Redic's claim under the Truth in Lending Act because there was insufficient evidence of its status as a "creditor" under the Act. Redic's pendent claim against Watts Realty Company under state law was submitted to the jury. The district court denied Schwartz' motion for directed verdict.

The jury's verdict awarded Redic damages against Schwartz in the amount of $2,944, representing $1,944 in damages for charging usurious interest and $1,000 as a statutory penalty under the Truth in Lending Act. The district court's judg-

ment also ordered the defendants, including Shirley E. Schwartz, to execute and deliver to Redic a warranty deed conveying to her the property in question, subject to: (1) Redic's repayment of the $3,000 loan made by the defendants, (2) her reimbursement to the defendants for payments made to the mortgage company during the pendency of the action, and (3) her reassuming the existing FHA deed of trust. Also, the district court ordered Schwartz to pay Redic's attorney's fees and costs in the amount of $31,382.53. This appeal followed.

II

A

In general, the Truth in Lending Act requires a "creditor" to disclose certain credit terms to a borrowing consumer, including the amount of a finance charge

and the annual percentage rate. 15 U.S.C. § 1631(a) (1982); 12 C.F.R. §§ 226.17 and 226.18 (1984). Failure to make the requisite disclosures can subject the creditor to civil liability in an amount equal to double the finance charge paid in connection with the transaction, but in no event less than $100 or more than $1,000. 15 U.S.C. § 1640(a)(2)(A).

The Truth in Lending Act imposes additional duties on a creditor, and different debtor rights come into play, if the creditor retains or acquires a security interest, as part of a credit transaction, in any real property "which is used as the principal dwelling of the person to whom credit is extended." 15 U.S.C. § 1635(a). The Act gives the debtor a right of rescission which normally must be exercised within three

days of the consummation of the transaction, and the creditor must provide the debtor with written notice of this limited right to rescind in addition to making all of the other usual disclosures required with any extension of credit. Id. When the creditor fails to disclose any items of the requisite information, the Act provides that the debtor's right to rescind is not limited by the normal three day period but continues until all the disclosures are made. 15 U.S.C. § 1635(f).

It is undisputed that the defendants failed to give Redic the disclosures required by the Act. Nor is there any dispute that Redic notified the defendants of her intent to rescind the transaction. Rather, the defendants contend that the transaction was not governed by the Act, and thus not subject

to the Act's civil penalties and right of rescission, because they were not "creditors" within the meaning of the Act.

Only "creditors" are subject to the Act's civil penalties. See 15 U.S.C § 1640(a). The Act defines the term "creditor," in part, as a "person who . . . regularly extends . . . consumer credit." 15 U.S.C. § 1602(f). In addition, Revised Regulation Z provides that the Act and that regulation apply only to individuals or businesses that offer or extend consumer credit when "the offering or extension of credit is done regularly." 12 C.F.R. § 226.1(c)(1)(ii). A footnote to § 226.1(c)(1)(ii) refers to the definition of "creditor" for the meaning of the term "regularly." Revised Regulation Z 226.2(a)(17)(i) defines "creditor" to include a person who

"regularly extends consumer credit," while footnote 3 to that section explains the quoted expression as follows:

> A person regulary extends consumer credit only if it extended credit more than 25 times (or more than 5 times for transactions secured by a dwelling) in the preceding calendar year. If a person did not meet these numerical standards in the preceding calendar year, the numerical standards shall be applied to the current calendar year. (emphasis added).

Since Redic did not allege that Schwartz had extended consumer credit other than secured by a dwelling, Schwartz would be a "creditor" within the meaning of the Act only if he extended consumer credit secured by a dewlling at least five times in the preceding or current year prior to the Redic transaction; that is in the period from January 1, 1980 until December 23, 1981 (the date of the Redic transaction).

In her amended complaint Redic

claimed the right to rescind the transaction under the Act, 15 U.S.C. § 1635(a), as implemented by Revised Regulation Z, 12 C.F.R. § 226.23, because the defendants had acquired a "security interest" in real property used as her principal dwelling. This claim required the application of North Carolina law because Revised Regulation Z, 12 C.F.R. § 226.2(a)(25), defines a "security interest" as an interest securing performance that is recognized by state law. Thus, whether Schwartz was a "creditor" within the meaning of the Act turns on whether at least five of the other twelve similar transactions were loans with security interests rather than sales with options to repurchase.

B

Under North Carolina law, the test

for determining whether a conveyance with an option to repurchase represents a true sale or merely a loan with a security interest focuses on the intent of the parties and not the form of the transaction. O'Briant v. Lee, 214 N.C. 723, 200 S.E. 865 (1939); McKinley v. Hinnant, 242 N.C. 245, 87 S.E. 2d 568 (1955). In ascertaining the real intention of the parties, however, the simple declaration of the plaintiff, who was grantor in the deed, will not suffice to show that the parties intended to create a mortgage. The North Carolina Supreme Court has stated:

> The intention [to create a mortgage] must be established, not by simple declaration of the parties, but by proof of the facts and circumstancs dehors the deed, inconsistent with the idea of an absolute purchase; otherwise, solemnity of deeds would always be exposed to the slippery memory of witnesses.

O'Briant v. Lee 214 N.C. at 731, 200 S.E.

at 870 (quoting Watkins v. Williams, 123 N.C. 170, 31 S.E. 388 (1898)). Thus, although a plaintiff may repeatedly testify that the transaction was intended to be a loan and that the land was conveyed for the sole purpose of securing the payment of that loan, the plaintiff must present more than his own simple declaration. Instead, the plaintiff must present proof of facts and circumstances dehors the deed inconsistent with the idea of an absolute purchase.

The North Carolina Supreme Court has identified six factors as pertinent in determining whether a transaction is a sale or a loan: (1) whether there was a debtor-creditor relationship created at the time of the transaction, Hardy v. Neville, 261 N.C. 454, 457, 135 S.E.2d 48, 51 (1964); (2) whether the "grantor" remains in possession or

whether the grantee takes immediate possession of the property, id. at 457, 135 S.E. 2d at 51; (3) whether the "grantor" was under distress and hard-pressed for money at the time of the transaction, O'Briant v. Lee, supra; Hardy v. Neville, 261 N.C. at 457, 135 S.E. 2d at 51; (4) whether the transaction originated out of an application for a loan, O'Briant v. Lee, 214 N.C. at 733, 200 S.E. at 871; (5) whether the purported sale price is less than the net worth of the property, id. at 733, 200 S.E. at 871; and (6) whether the "grantor" was obligated to exercise the "option to repurchase." Hodges v. Hodges, 37 N.C. App. 459, 246 S.E. 2d 812 (1978). The North Carolina Supreme Court has counseled that doubts about whether the transaction is a sale or a mortgage are to be construed in favor of a mortgage in

order to prevent the possibility of oppression created by an outright sale. O'Briant v. Lee, 214 N.C. at 732, 200 S.E. at 869; McKinley v. Hinnant, 242 N.C. at 252, 87 S.E.2d at 573.

C

The first issue presented is whether Schwartz was a "creditor" within the

meaning of the Act.[1] As described above, this issue turns on whether he extended consumer credit secured by a dwelling at least five times in the preceding or current year prior to the Redic transaction, i.e., in the period from January 1, 1980, until December 23, 1981.

---

[1] The defendants also argue that the district court's judgment should be reversed because the transaction in question was a sale with an option to repurchase, rather than a loan with a security interest, as a matter of law. In support of this argument the defendants rely on their testimony, Redic's failure to claim a mortgage interest deduction on her income tax return filed after this suit, and the inscription "for rent" placed on all twelve rent payments. We decline to review this contention, however, because the defendant's Rule 50 motions failed to raise any question about the sufficiency of the evidence regarding Redic's claim that the transaction in question was a loan with a security interest. Tights Inc. v. Acme-McCrary Corp., 541 F.2d 1047, 1058 (4th Cir. 1976), cert. den., 429 U.S. 429 (1976). In fact, in one motion defendants' counsel explicitly disclaimed any question of sufficiency on that question.

12 C.F.R. § 226.2(a)(17)(i) n.3. This issue, in turn, depends upon whether five of the previous twelve similar transactions involving Schwartz and Watts Realty Company were, in reality, loans with security interests and not sales with options to repurchase.

Redic introduced direct evidence of intent from only four of the grantors involved in the twelve similar transactions with Schwartz.[2] The defendants, however, introduced unrefuted affidavits

---

[2] In her motion for summary judgment Redic submitted the affidavit of James Gillespie. In his affidavit Gillespie stated that his transaction with Schwartz was a loan with a security interest and not a sale with an option to repurchase. At trial, however, Gillespie recanted his prior statement and testified that his transaction was, in reality, a sale with an option to repurchase. But even including Gillespie, Redic introduced direct evidence of intent from only four of the other twelve grantors.

regarding intent from each of the remaining grantors. Each of these latter grantors swore that he had sold his home to Schwartz, had never requested or received a loan from either defendant, and knew that he absolutely sold his property to Schwartz. Several of these grantors later testified at trial on behalf of the defendants. We do not think a jury is free to recharacterize another transaction not the subject of the suit as a loan with a security interest, rather than a sale with an option to repurchase, when the transaction is evidenced by a general warranty deed absolute on its face and both parties to the transaction give unrefuted testimony that the transaction was a sale with an option to repurchase. To allow a jury to recharacterize such a transaction as a loan with a security interest would be contrary to

the North Carolina Supreme Court's command that the true nature of a transaction depends upon the intention of the parties.

The only reasonable inference that could be drawn from the evidence was that Schwartz was not a "creditor" within the meaning of the Act because the evidence conclusively showed that he had not engaged in the requisite number of real estate transactions to be classified as one who "regularly extends . . . consumer credit" 15 U.S.C. § 1602(f); 12 C.F.R. §§ 226.1(c)(1)(ii) and 226.2(a)(17)(i) n.3. Thus, the district court erred in denying Schwartz' motion for directed verdict. Accordingly, we reverse that portion of the district court's decision which awarded Redic relief under the Truth in Lending Act.

III

The second issue concerns Redic's pendent claim under North Carolina usury statute, N.C. Gen. Stat. § 24-2 (1965). The jury awarded Redic $1,944 in damages against Schwartz for charging her usurious interest. In United Mine Workers v. Gibbs, 383 U.S. 715 (1966), the Supreme Court held that if a federal claim against a party is dismissed before trial, the pendent state law claims should be dismissed as well. The Ninth Circuit has held, however, that once a trial is held a court of appeals should order dismissal of a pendent claim on remand only "when the federal cause of action was so insubstantial and devoid of merit that there was no federal jurisdiction to hear it." Traver v. Meshriy, 627 F.2d 934, 939 (9th Cir. 1980) (citing Hagans v. Lavine, 415 U. S. 528 (1973)).

It also stated that if the federal claim was not frivolous, then the issue of whether the district court should have heard the pendent state claim is a matter committed to the sound discretion of the district court. Traver, 627 F.2d at 939.

We conclude that Redic's Truth in Lending claim was not frivolous and that the district court did not abuse its discretion in hearing Redic's pendent North Carolina claim for usury. Therefore, we affirm that portion of the district court's decision awarding her $1,944 in damages against Schwartz for charging her usurious interest. The award of counsel fees was made under the Truth in Lending Act and since recovery under that cause of action has been reversed, the award of counsel fees is also reversed.

REVERSED IN PART,
AFFIRMED IN PART.

Filed June 5, 1985

U.S. COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1393(L)

Mable A. Redic,

Appellee

versus

Gary H. Watts Realty Co., and David S. Schwartz,

Appellants,

and

Shirley E. Schwartz

Defendant.

No. 84-1523

Mable A. Redic,

Appellee,

versus

Gary H. Watts Realty Co., David S. Schwartz,

Appellants,

and

Shirley E. Schwartz,

Defendant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Russell and Judge Haynsworth.

For the court,

John M. Greacen

Supreme Court, U.S.
FILED
SEP 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-338

In The

Supreme Court of the United States

October Term, 1985

MABLE A. REDIC,

Petitioner,

vs.

DAVID S. SCHWARTZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION

RALPH C. CLONTZ, JR.
CLONTZ AND CLONTZ
Attorneys at Law
The Justice Building
225 South McDowell Street
Charlotte, N.C. 28204-2294
(704) 376-0045

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly reversed the Truth-in-Lending portion of the final judgment of the District Court?

2. Whether Petitioner has shown any special and important reasons under Rule 17 that warrant the grant of certiorari?

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No. 85-338

In The

Supreme Court of the United States

October Term, 1985

MABLE A. REDIC,

Petitioner,

vs.

DAVID S. SCHWARTZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS

In addition to those Opinions listed in the Petition, the following Order and the final opinion of the District Court are relevant to this proceeding:

Order of Trial Judge entered January 10, 1984, denying defendants' motion for summary judgment. Respondent's Appendix, pp. 1A-6A.

Memorandum of Decision and Omnibus Order of Trial Judge entered on March 9, 1984. Respondent's Appendix, pp. 6A-11A.

STATEMENT OF THE CASE

Petitioner Mable A. Redic ("Redic") brought this action on December 20, 1982 in the United States District Court for the Western District of North Carolina against defendants Gary H. Watts Realty Co., a corporation ("Watts Realty"), David S. Schwartz, a sole proprietor ("Schwartz") and Shirley E. Schwartz (Schwartz's wife), asserting three claims for relief: (1) Defendants' failure to comply with the Truth-in-Lending Act ("T-i-L Act") and revised Regulation Z ("Rev. Reg. Z") disclosure requirements entitled her to a civil penalty of $1,000 plus costs and attorneys' fees; (2) She could rescind the transaction under the T-i-L Act and Rev. Reg. Z and was entitled to a refund of any finance and other charges paid; and (3) Defendants' interest charges in a loan gave Redic a pendent North Carolina state law usury claim with damages of $1,728.

Defendants' answer stated that none of them (1) was a "creditor," (2) had "regularly extended" consumer credit as defined by Rev. Reg. Z, or (3) had made or offered to make a loan to Redic. Following discovery, defendants moved for summary judgment supported by 34 affidavits. Redic filed 6 affidavits (*but no personal affidavit*) and 3 depositions in opposition. Redic subsequently filed a motion for summary judgment, in contradiction of her pleadings and her own deposition and *unsupported by evidence, logic, or authorities,* and claimed that the transactions between Redic and defendants conjunctively amounted to a "credit sale" transaction as a matter of law.

Although she had based her complaint upon and conducted all discovery under *revised* Reg. Z, she now claimed in her memorandum opposing defendants' summary judgment motion that the case was governed by the earlier regulation. The trial judge at first denied both motions. But after defendants moved for reconsideration, the trial judge entered an order on January 20, 1984, denying defendants' motion and stating his reasons for the denial. He did not address the issue of which regulation applied, basing his erroneous decision on "appropriate Regulation Z." Respondent's Appendix ("R/App."), pp. 1A-6A.

Prior to trial, defendants requested the trial judge to conduct the Pre-trial Conference *required* by the local rules, explaining that *both sides* had to know which regulation would apply at trial. The judge responded, however, that he would conduct the hearing "some time during the trial." The case was tried before a jury, with United States District Judge James B. McMillan presiding, on January 25-27 and 30, 1984. Each defendant moved under Rule 50 for a directed verdict both at the end of Redic's evidence and after all the evidence had been presented. Both motions were denied. However, when Judge McMillan *later* held the so-called "Pre-trial Conference" following the close of all the evidence, he decided that the case was governed by Rev. Reg. Z, rather than the prior regulation. On that basis he held that Watts Realty was not a "creditor" and, therefore, not subject to the T-i-L Act. But he denied Watts Realty's request for a directed verdict on Redic's pendent state usury claim.

The jury then reached an inconsistent verdict finding that both Schwartz and Watts Realty had made a loan to

Redic but that only Schwartz had charged usurious interest. Judge McMillan filed a Judgment and a "Memorandum of Decision and Omnibus Order" on March 9, 1984, in which he (1) awarded Redic $2,944 against Schwartz on her T-i-L Act and pendent usury claims but required her to pay defendants $3,314, (2) *allowed Redic to rescind the transaction as to all three defendants,* even though the judge had found Watts Realty to be not subject to the T-i-L Act, and required defendants to reconvey the realty and (3) allowed Redic to recover her attorney's fees from Schwartz in an amount to be set later. On May 14, 1984, Judge McMillian awarded Redic's counsel fees and costs against Schwartz totalling $31,382.53.

The Fourth Circuit entered its opinion and judgment on May 9, 1985, vacating the Truth-in-Lending portion of the final judgment of the lower court but affirming Redic's pendent usury award of $1,944 *on a technicality, not on the merits.* 726 F.2d 1181, 1186, fn. 1., Petitioner's Appendix ("P/App."), pp. 22a, 27a.

On May 20, 1985, *the day before she petitioned the Fourth Circuit for a rehearing,* Redic served a *totally unsupported* Rule 59, F.R.Civ.P., motion for new trial in the District Court, claiming "newly discovered" evidence. This new evidence was an affidavit she had obtained over a year before, on May 11, 1984. Redic's counsel represented to the District Court, in a "cover letter" to the District Court Clerk sending the motion for filing, that her motion was timely as it had been served within ten days after the entry of the *Fourth Circuit's judgment* on May 9, 1985. In this "cover letter," her counsel further stated: "A judgment was entered in the Court of Appeals on May 9, 1985. I sug-

gest that no action needs to be taken on this motion until the file is returned from the Court of Appeals." R/App., p. 65A.

Defendants made timely filing of their response supported by authorities. They asserted that (1) the District Court lacked jurisdiction to hear the motion, particularly in view of the Stay Order of Circuit Judge Sam J. Ervin, III; (2) the motion was time-barred under Rule 59(b), F. R.Civ.P., and Redic was guilty of laches; (3) the purported evidence was not "newly discovered" since it had been in Redic's counsel's possession since May 11, 1984; (4) the evidence would not have changed the result at trial; and (5) the motion was filed in bad faith, in an improper attempt to circumvent the jurisdiction, opinion, and mandate of the Fourth Circuit Court of Appeals.

On May 21, 1985, Redic served a Petition for Rehearing and Suggestion for rehearing *en banc* to the Fourth Circuit. She did not mention the purported "newly discovered" evidence in her Brief or during oral argument and made no request in her rehearing petition that the Fourth Circuit direct the District Court to hear or grant her motion for new trial. The Fourth Circuit denied her petition on June 5, 1985 and duly issued its mandate, which was filed in the District Court on June 14, 1985. However, Judge McMillan has thus far refused to implement the Fourth Circuit's mandate that vacated all portions of the District Court's judgment except the usury award against Schwartz. Further, even though Schwartz has fully satisfied the final judgment, as modified by the mandate of the Fourth Circuit, by paying the usury award to petitioner with all interest due thereon. the District Court Clerk has refused to release the municipal bonds deposited

as security for the supersedeas bond under Circuit Judge Ervin's order unless Schwartz obtains a court order so directing him.

On June 25, 1985, Judge McMillan entered an order directing Redic to file a memorandum stating the legal basis for her demand for a new trial and further directing her to inform the court on what date the affidavit asserting the "new evidence" was signed. Redic's counsel sent a "Letter-Motion" to the District Court Clerk on July 2, 1985, seeking an extension of time within which to comply with this order. He stated: "It may be that the Court will in any event want to defer taking any action on this motion for the time being, as we plan to petition the United States Supreme Court for a writ of certiorari." R/App., p. 67A. Nevertheless, Redic filed her memorandum on July 12, 1985. Schwartz responded to Redic's memorandum on August 7, 1985, and the motion was heard before Judge McMillan on August 12, 1985. The judge had not rendered his decision when this Brief was prepared.

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Statement of Facts

On December 23, 1981, Schwartz and Watts Realty purchased Redic's equity in her home for $17,100, leased it back to her for a year and gave her an option to repurchase it at any time within one year for the sale price plus a realtor's commission of 3.5%. Execution of the contracts was judicially admitted. Respondent's Appendix ("R/App.") (REQ. Z, AA, DD, FF, OO), pp. 29A, 30A, 31A, 33A.

Redic could read and write and understand legal contracts. She was not hard-pressed financially but, rather,

treated her debts irresponsibly. She had filed for an arrangement under Chapter 13 of the Bankruptcy Code with the Bankruptcy Court during 1976 and was still under it. Her gross income in 1981 was $23,776.51; but her real estate mortgage was six months in arrears in February, 1981. To bring these payments current, she took $1141 from her "savings account at work." She made only two more payments on her home mortgage after February, 1981.

Because of her continued delinquency, the mortgagee started a foreclosure proceeding on December 1, 1981. The Bankruptcy Judge had prohibited Redic from incurring any debts during her Chapter 13 proceeding, and she knew that she could not obtain any loans without the Trustee's prior approval. R/App. (REQ. C, D), pp. 26A, 27A, 32A—*Judicial Admission* ("J/Adm."). At least five people contacted her about buying her equity in her home. *She knew that if she did not sell her property, it would be foreclosed.* Redic had originally bought her home from HUD after a foreclosure, at which time she paid the former owner nothing for his equity.

On December 23, 1981, when her transactions with Schwartz and Watts Realty were closed out, the closing attorney explained the contracts to her, and she understood them. *She knew that the deed she signed transferred title to her property to Schwartz and Watts Realty.* R/App. (REQ. CC), pp. 29A, 33A—J/Adm. She said nothing at the closing about getting a loan; and *before hiring Attorney Lesesne, did not recall telling anyone, anywhere, that she had a loan from Schwartz.*

On November 24, 1981, before the foreclosure started, Redic applied to Graham Investment Company

("Graham") to borrow $3700, to be secured by a second home mortgage. She intended to apply the $3,700 as follows: (1) $1100 to pay the arrearage in her mortgage loan payments; (2) $1170 to "pay out" her Chapter 13 plan; and (3) the balance to be used for home improvements. Prior to applying for this loan, Redic notified the Bankruptcy Trustee and requested his approval. The Trustee confirmed the balance due to Graham, but Graham refused to make the loan since she was already in default on her first home mortgage loan. At no time during 1981 *or later* did Redic notify the Trustee about, or request his approval of, her obtaining any loan from Schwartz and Watts Realty.

Redic took no deduction for any interest paid to Schwartz or Watts Realty in her tax return filed *after* she started her suit. She also *judicially admitted:* (1) She made all 12 rent payments and wrote on each check that it was for "RENT;" (2) when twice served with eviction papers (*the last time being only two months before she filed suit*), she did not tell the Magistrate, the deputy sheriff who served her, or any other court officials that she was not a tenant or that she was the owner of the leased premises; (3) she was not evicted by Schwartz because she brought her *"rental payments"* (sic) current; and (4) *in December, 1982, Redic "requested Defendant David S. Schwartz to allow her an extension of time within she might exercise her option to purchase the property under the terms of the option . . ., but said Defendant denied her request."* (Emphasis added.) On that occasion, "Plaintiff told said Defendant that she was expecting to obtain a loan 'within a couple months' thereafter *that would enable her to exercise her option to purchase the property."*

(Emphasis added.) R/App. (REQ. GG, HH, LL, MM, NN, QQ, RR), pp. 29A, 30A, 31A, 33A. When Schwartz refused to extend the time to exercise the option, Redic brought this suit.

Redic's counsel wrote letters to individuals who had sold their property to Schwartz in ten of the twelve transactions similar in general format to Redic's transactions, asking them to call him. R/App., pp. 56A-62A - J/Adm.

———o———

ARGUMENT

Preliminary Response

The length and detail of this response to a clearly meritless petition are dictated by Redic's having misread and misinterpreted and thus misrepresented the basis of the Fourth Circuit decision and having misstated the nature and extent of the evidence offered in the trial court. Schwartz has furnished herein the North Carolina law applied by the Fourth Circuit, but largely ignored by the trial judge. The accompanying Appendix includes critical evidentiary portions of the voluminous Record and pleadings considered by the Court of Appeals in reaching its decision.

———o———

SUMMARY OF ARGUMENT

I. The Truth-in-Lending portion of the District Court's judgment was reversed because of the trial judge's continual misconception and misapplication of applicable North Carolina law throughout all critical stages of the case below.

II. The reversal by the Fourth Circuit was based upon Redic's failure to offer evidence to establish her case under North Carolina law rather than because of any "credibility disputes" between the Fourth Circuit and the jury.

III. There are no "special and important" reasons under Rule 17 that would warrant this Court's granting Redic's Petition for a Writ of *Certiorari*.

I. The Truth-in-Lending Portion Of The District Court's Judgment Was Reversed Because Of The Trial Judge's Continual Misconception And Misapplication Of Applicable North Carolina Law Throughout All Critical Stages Of The Case Below.

The Fourth Circuit reversed the Truth-in-Lending portion of the district court's judgment because a single pervasive misconception and misapplication of applicable North Carolina law caused the trial judge to err consistently throughout all critical stages of the case below and to deny defendants' motions for summary judgment and for a directed verdict. The judge erroneously ruled that: (1) the intentions of parties to written contracts could be ignored in determining the true nature of their transactions and (2) the judge could "make a new contract for the parties" by interpreting the contracts in direct conflict with the clear meaning of their language.

Redic claimed federal jurisdiction under T-i-L Act § 130(e), 15 U.S.C. § 1640(e), asserting that Schwartz and Watts Realty were "creditors" under *revised* Regulation Z, 12 C.F.R. ("Rev. Reg. Z") § 226.2(a)(17). She alleged that Shirley E. Schwartz was merely a "necessary party," but sought the T-i-L. Act civil penalty, costs, attorneys fees and the rescission right against all three defendants.

Redic admits that neither defendant could have been a "creditor" unless such defendant extended consumer credit secured by a dwelling *at least 5 times* in the period from January 1, 1980 until December 23, 1981—all prior to Redic's transactions. Petition, pp. 7, 8; P/App., p. 16a.

A. Analysis Of Applicable North Carolina Law—Parol Evidence Rule And The Limited Exception.

Under *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and its progeny, the District Court was required to apply North Carolina state law as declared by its highest court. *Redic admits this,* Petition, p. 8. In the absence of a holding on point by the highest state court, those of the intermediate appellate courts are binding. *Fidelity Union Trust Co. v. Field,* 311 U.S. 169, 61 S.Ct. 336, 85 L.Ed. 109 (1940). By electing to bring her action in federal court (rather than in State court as she could have done under T-i-L Act § 130 (e), 15 U.S.C. § 1640(e)), Redic was bound by all applicable existing North Carolina law.

When Schwartz and Watts Realty purchased Redic's equity in her home on December 23, 1981, she executed a contract of sale, a deed absolute on its face, and a closing statement. They and she also executed a 12 month-term real estate lease. Schwartz and Watts Realty also gave Redic a *written* option to repurchase the real estate allowing (*but not obligating*) her to purchase it at any time during the next 12 months for essentially the same amount she received plus a 3.5% realtor's commission. Schwartz entered into twelve other transactions (*only one of which involved Watts Realty*) during the relevant period. These

were documented by the same *general types* of documents as those evidencing the Redic transactions, although the contract terms in each significantly varied (''12 relevant transactions''). *Watts Realty entered into only one such type of transactions prior to Redic's transactions with it during this period.*

North Carolina Parol Evidence Rule

The North Carolina ''parol evidence'' rule generally prohibits the admission of parol evidence to vary, add to, or contradict the terms of written instruments. *The rule in realty is not one of evidence but of substantive law.* 2 H. Brandis, *N.C. Evidence,* § 251, at 266 (2d rev. ed. 1982); *Clifford v. River Bend Plantation, Inc.,* 67 N.C. App. 438, 440, 313 S.E.2d 607 (1984); *Roberts v. Browning,* 610 F.2d 528, 533. (8th Cir. 1979). *Both real estate deeds and leases are subject to this rule.* 2 H. Brandis, *supra,* § 255, at 279-282; 5 *N.C. Index 3d.,* Deeds § 11.1, at 143; *Id.,* Evidence § 32.2, at 91; *Crockett v. First Federal S&L Ass'n.,* 289 N.C. 620, 224 S.E.2d 580 (1976); *Matter of Bonder,* 55 N.C. App. 373, 285 S.E.2d 615 (1982).

Where the language of a contract is clear and unambiguous, ''the court may not, under the guise of construction, ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written . . .'' 3 *N.C. Index 3d,* Contracts § 12.1, at 392; *Nationwide Mut. Ins. Co. v. Edwards,* 67 N.C. App. 1, 312 S.E.2d 656, 659 (1984); *Riteway Carriers v. Stuyvesant Ins. Co.,* 213 F.2d 576, 578 (8th Cir. 1954); *Hardware Mut. Cas. Co. v. Wendlinger,* 146 F.2d 984, 988-9 (4th Cir. 1945).

In her legal memorandum opposing defendants' motion for summary judgment and during oral argument,

Redic's counsel contributed to the trial judge's confusion and invited his errors when he asserted a *totally unsupported* theory that "the documents somehow spoke for themselves and said that their true nature was contrary to the plain meaning stated by their language." *Despite the lack of support by either authorities or logic, this theory was embraced thereafter by the trial judge.* Redic's counsel argued at the hearing on the summary judgment motions "that the law is that the court should find that there was a security interest taken in the property regardless of what the parties said, even if Ms. Redic didn't intend for it to be a credit transaction, [and] even if Mr. Schwartz didn't. . . ." It was on this "documents speak for themselves" theory, plus an erroneous ruling that the intentions of the parties were not relevant, that the judge later denied Schwartz' motion for a directed verdict.

Limited Exception Rules As To Deeds And Options

Although there are few exceptions to the parol evidence rule, a series of North Carolina decisions establish a *very narrow* exception to this rule ("Limited Exception"). It states that *certain* parol evidence will be admitted to show the making of a loan when the parties simultaneously execute (1) a deed absolute on its face and (2) an option *obligating* the grantor in the deed to repurchase the property demised, and all of the contracting parties intend *at the inception of the transaction* that the deed and option conjunctively evidence a loan secured by a real estate mortgage.

The rules setting the limitations, scope and exclusions under the Limited Exception were required to be applied to Redic's and the 12 relevant transactions to de-

termine their true nature. The Fourth Circuit applied those rules in reversing the Truth-in-Lending portion of the trial court's judgment, but it merely summarized in its opinion the factors pertinent to determining whether a transaction is a sale or a loan (P/App., p. 19a), since Redic offered evidence that would support a finding of *only four* consumer transactions by Schwartz at the summary judgment level and *only two* such transactions at trial—in neither instance meeting the Rev. Reg. Z requirement that she offer proof of at least five.

The Record establishes that both sides relied on the same North Carolina appellate decisions. The Fourth Circuit applied the following "absolute exclusionary rules" provided by applicable North Carolina law in reaching its decision to reverse the Truth-in-Lending portion of the District Court's judgment:

Rule 1. The intentions of parties may not be proved by simple declarations of *parties trying to contradict written contract terms,* but rather by proof of facts and circumstances *de hors* the deed that are inconsistent with the idea of an absolute purchase; *otherwise, the solemnity of deeds would always be exposed to the "slippery memories of witnesses."* O'Briant v. Lee, 214 N.C. 723, 731, 200 S.E.2d 865, 870 (1939); *Ricks v. Batchelor,* 225 N.C. 8, 11, 33 S.E.2d 68, 70 (1945); *McKinley v. Hinnant,* 241 N.C. 245, 87 S.E.2d 568, 573 (1955); *Hodges v. Hodges,* 37 N.C. App. 459, 246 S.E.2d 812, 817 (1978).

Rule 2. If the grantor-optionee *is not obligated under the written agreement of the parties* to exercise the repurchase option, no loan could be involved *as a matter of law.* Further, an admission by the grantor that he knew that he had the right to exercise the option *establishes as*

a matter of law that the optionee was not obligated to exercise it and thus that no loan was involved. *This rule has been affirmed as recently as 1984. Hodges, supra,* 37 N.C. App. at 467, 246 S.E.2d at 817 (1978); *Id,* 67 N.C. App. 290, 294, 312 S.E.2d 703 (1984); *Eagle's Nest v. Malt,* 70 N.C. App. 397, 319 S.E.2d 685 (1984); *O'Briant, supra,* 212 N.C. at 800, 195 S.E. at 20 (1938), *Id,* 214 N.C. 723, 727, 200 S.E. 865, 868 (1939); *Ferguson v. Blanchard,* 220 N.C. 1, 7, 16 S.E.2d 414, 418 (1941) and *Ricks, supra. This rule also applies to claims of usury.* DeHart *v. R/S Fin. Corp.,* 66 N.C. App. 648, 649, 311 S.E. 2d 694 (1984).

Redic's *judicial admission* that she applied to Schwartz for an extension of time within which to exercise her purchase option *and that she told him that she expected to get a loan shortly to enable her to exercise it* established that no loan was involved in her transactions as a matter of law. Further, none of the affiants that had entered into transactions with Schwartz claimed, in affidavits introduced by Redic in opposition to defendants' summary judgment motion, that they had been obligated to exercise their purchase option. R/App., pp. 34A-40A.

Rule 3. A debtor-creditor relationship must exist at the inception of the transaction. Unless the party who gives the option can sue to collect the option price, no loan could be involved since a lender's ability to collect the money loaned is the very essence of a debtor-creditor relationship. Since Redic admitted that she did not exercise her option within the time limits agreed upon by the parties, Schwartz and Watts Realty obviously could no have collected the "option price" by suit or otherwise. *O'Briant, supra,* 212 N.C. at 801, 195 S.E. at 20; *Ferguson, supra,* 220 N.C. at 8, 16 S.E.2d at 418 (1941); *Ricks, supra;*

Hardy v. Neville, 216 N.C. 454, 457, 135 S.E.2d 48, 51 (1964); and *Hodges, supra.*

Rule 4. If the documents executed by the parties include a lease agreement, the transactions are excluded from the Limited Exception. Mindful of the District Court's obligation to apply North Carolina law, we note that in none of the decisions that created or applied the "Limited Exception" had the parties executed a real estate lease in addition to the deed and purchase option. Indeed, in *O'Briant, supra,* 212 N.C. at 799, 195 S.E. at 19 (1938), the defendant claimed *defensively* that the "side agreement" requiring plaintiffs to pay an extra $1,200 upon exercise of the option was a "lease agreement." However, the clear language of the agreement disproved this defensive claim.

Under the parol evidence rule applicable to leases, absent allegations of fraud, misrepresentation or other invalidating cause, it is *conclusively* presumed that the lease agreement supersedes any oral agreements and expresses the parties' actual engagements—especially where the lease agreement includes an "exclusion clause," e.g., the clause in the Redic lease, which provided: "No other agreements shall be binding unless in writing and signed by both parties herein." *U.S. Leasing v. Hall,* 264 N.C. 110, 141 S.E. 2d 30 (1965), citing *Wilkins v. Commercial Fin. Co.,* 237 N.C. 396, 75 S.E.2d 118 (1953). *See also in accord*: *In re Wright Homes, Inc.,* 279 F.Supp. 598 (M.D.N.C. 1968); *Falco v. Hood,* 7 N.C. App. 717, 173 S.E.2d 578 (1970); *Nytco Leasing, Inc. v. Dan-Cleve Corp.,* 31 N.C. App. 634, 230 S.E.2d 559, *cert. denied,* 292 N.C. 265, 233 S.E.2d 293 (1977); *Stillwell Enter. v. Interstate Equip. Co.,* 330 N.C.

286, 266 S.E.2d 812, 816 (1980). *Redic significantly made no claims of fraud, mistake, misunderstanding, or misrepresentations.*

We further find that a lessee is estopped from asserting the invalidity of a lease when she has taken possession of the premises and paid the stipulated rent or otherwise exercised control of the premises. 8 *N.C. Index 3d,* Landlord and Tenant § 2, at 228, 229; *Carolina Helicopter Corp. v. Cutter Realty Co.,* 263 N.C. 139, 139 S.E.2d 362, 368 (1964). Also, a tenant may not dispute the landlord's title either by setting up an adverse claim or by showing title in a third person. 8 *N.C. Index 3d,* Landlord and Tenant § 3, at 230-231; *Harwell v. Rohrabacher,* 243 N.C. 255, 258, 90 S.E.2d 499 (1955). Redic *judicially admitted*: (1) having occupied the premises and having made all twelve rental payments due under the lease with each check showing that it was for payment of "RENT"; (2) when twice sued for eviction, not telling any court official that she was not a tenant or that she was the owner of the dwelling; and (3) not being evicted because she brought her "rental payments" (*sic*) current. R/App. (REQ. GG, HH, LL, MM, NN), pp. 29A, 30A, 33A.

B. Application Of North Carolina Limited Exception Rules To Evidence Offered By Redic.

The Fourth Circuit, basing its opinion upon the entire voluminous Record in the lower court, noted the trial judge's failure to apply North Carolina law in denying defendant's motions for summary judgment and a directed verdict. However, the reversal was expressly based upon the District Court's denial of Schwartz' motion for a directed verdict.

Redic was obligated to introduce evidence that would support a finding that Schwartz and Watts Realty had entered into *at least* five consumer credit transactions prior to their transactions with her to prove them to be "creditors." As noted in the Fourth Circuit opinion (P/App., pages 9a, 10a), defendants submitted *unrefuted* affidavits of the grantors in eight of the twelve relevant transactions in support of their summary judgment motion. In these affidavits, each grantor swore that he (1) sold his home to Schwartz, (2) rented his home from Schwartz (for varying terms, with some leases renewed), (3) received an option to repurchase, *which he was not obligated to exercise and had cancelled,* (4) never requested or received a loan from either defendant, and (5) knew that he had *absolutely* sold his property to Schwartz. In response to these affidavits, Redic filed her counsel's affidavit which furnished some of the documents executed by these affiants, but these documents fully corroborated the affiants' testimony. Redic's evidence opposing defendants' motion for summary judgment consisted of affidavits and a deposition from parties involved in *only four* of the 12 relevant transactions. R/App., pp. 34A-40A; P/App., page 23a. *Note: Redic filed both an affidavit by and a deposition of Baron Alexander.*

Defendants' unrefuted factual submissions were sufficient to defeat Redic's claims; they were entitled to summary judgment because Redic failed to offer any "specific facts" to show a genuine issue of material fact. *O'Dowd v. South Central Bell,* 729 F.2d 347, 350-51 (5th Cir. 1984) (unrefuted affidavit as to intent); *Paterson v. General Motors, Inc.,* 631 F.2d 476, 483 (7th Cir. 1980); *Minn. Min. & Mfg. Co. v. U.S. Rubber Co.,* 279 F.2d 409, 415 (4th Cir.

1960); *First Nat. Bank v. Cities Ser.*, 88 S.Ct. 1575, 1592-3, 391 U.S. 253, 20 L.Ed.2d 569 (1968); *Selman v. Manor Mtg. Co.*, 551 F.Supp. 345 (E.D. Mich 1982) (unrefuted affidavit showed too few transactions to make defendant a "creditor"); *BOAC v. Boeing Co.*, 585 F.2d 946 (9th Cir. 1978)

Judge McMillan demonstrated his continuing misconception of the law and misperception of the relevant facts when he entered an *ex parte* order on January 20, 1984 (R/App., pp. 1A-6A) detailing his "reasons" for denying defendants' motion, and listing therein 19 "Findings of Facts" said to be supported by Redic's evidence offered in opposition to defendants' motion for summary judgment. However, he erred therein since his purported "findings" came from Redic's counsel's legal arguments rather than from her evidence.

In Findings 15 and 16, he "found" that Redic had defaulted in her payments and that *defendants* had brought a "foreclosure proceedings" (sic); whereupon plaintiff filed her suit. R/App., p. 4A. It obviously was her mortgage company that had instituted the foreclosure proceeding, and Redic made all 12 of her rental payments under the lease. Petition, page 5; P/App., p. 4a; R/App., (REQ. GG) pp. 29A, 33A.

In Finding 17 (R/App., pp. 4A-5A), Judge McMillan found both Schwartz and Watts Realty to be "creditors" under "appropriate Regulation Z" and that they had entered into twelve consumer credit transactions even though the documents showed on their face, *and Redic admitted in her memorandum,* that Watts Realty was involved in only one. The claimed consumer credit transactions were said to have involved: (1) Gillespie, (2) W. Jackson, (3)

Hughes, (4) Alexander, (5) Hood, (6) Drayton, (7) Smith, (8) Springs, (9) Rinehardt, (10) B. Watts, (11) R. Jackson, and (12) Perry. Watts Realty was involved solely in the Hughes transaction. Each of the last seven persons listed had given *totally unrefuted* affidavits negating any loan from Schwartz, which averments were substantiated by their transactional documents introduced by Redic's counsel's affidavit. The Hood transaction did not involve a purchase option and was not claimed by Redic to be one of the 12 relevant transactions. To reveal the *true* Record on point, the affidavits of the grantors in all 12 relevant transactions that were introduced by the parties supporting and opposing the summary judgment motion, *including affidavits from two* (Gillespie and Willie Jackson) *that recanted their prior purported affidavits signed for Redic* and were not called by her to testify at trial, are furnished in R/App., pp. 12A-25A, 34A-56A.

Even though Redic obviously knew the identities and addresses of the grantors in all 12 relevant transactions, and her counsel had written letters to ten of them and taken affidavits from four (two of which recanted), she deposed only one and called only one as her witness at trial. Her one grantor-witness (Hughes) and one deposition (Alexander) furnished evidence at trial that would have supported a jury finding that Schwartz had entered into *only two* consumer credit transactions during the relevant period. While Redic initially *pro forma* introduced in evidence, *en masse,* copies of most of the documents evidencing the 12 relevant transactions, the Record establishes that these documents were neither read to or by the jury or the judge. The "piling of these 78 pieces of paper on the clerk's desk" attracted so little attention that the

court reporter initially failed to note their introduction. When she supplemented the trial transcript, she had no knowledge of even the titles of the documents; neither did the judge or jury. R/App., pp. 62A-65A. The result of Judge McMillan's use of Redic's "documents speak for themselves" theory is seen in his charge to the jury (R/App., p. 65A) concerning these unread and unseen bits of paper evidencing the 12 relevant transactions as follows:

> "There are also the factors to be considered by you in *the other extensions of credit* which the evidence shows that the defendant Schwartz made over this period of time. . . ." (Emphasis added.)

Redic, further, offered no competent evidence at trial concerning ten of the 12 relevant transactions.

In addition to herself, Redic offered witnesses Ledbetter and Furr concerning her own transactions and witness Hughes, who claimed a consumer credit transaction with Schwartz and Watts Realty. R/App., p. 63A. The documents evidencing the 12 relevant transactions clearly furnished no evidence from which a jury could properly find that their true nature differed from the clear meaning of their language since Redic offered no evidence that contradicted it. The mere simultaneous execution of a deed absolute on its face and a "Repurchase Option Agreement" does not, of itself, stamp the transaction as a loan secured by a real estate mortgage. Thus, the mere introduction of such documents would not offer proof that the transactions could be loans. That character attaches only when all parties intended *at its inception* that the deed serve as a form of security for a debt or loan. Further, "[i]f the agreement for reconveyance expressly recites that it is not intended as a mortgage, this is conclusive . . ."

O'Briant, supra, 212 N.C. at 801, 195 S.E. at 20 (1938). *See also in accord*: *O'Briant, supra,* 214 N.C. at 727, 200 S.E. at 868 (1939); *Ferguson, supra,* 220 N.C. at 8, 16 S.E. 2d at 418 (1981); *Ricks, supra; McKinley, supra,* 241 N.C. at 251, 87 S.E.2d at 573 (1955); *Hodges, supra,* 37 N.C. App. at 467, 246 S.E.2d at 817. Also, a party offering documentary proof bearing on an issue, *as Redic did,* vouches for its accuracy and is bound by its recitals and may impeach or contradict it only by introducing evidence going to its invalidity or which tends to show that it is not in law what it appears to be. 29 Am. Jur.2d § 840, Evidence, at p. 931; *Minn. Min. & Mfg. Co. v. U.S. Rubber Co., supra,* 279 F.2d at 415 (4th Cir. 1960).

Redic inexplicably asserts to this Court, on Petition page 10, that "[t]here was also direct evidence at trial from three of the 12 so-called grantors . . . that their intent was to make a loan." In footnote 2, p. 10, she asserts that one of the witnesses (referring to Gillespie) had testified "inconsistently that the parties' intent was both to make a loan and a sale."

The Fourth Circuit, based upon the entire Record, noted that while Gillespie had given Redic an affidavit that said that a loan was involved: "At trial, however, Gillespie recanted his prior statement and testified that his transaction was, in reality, a sale with an option to purchase." (P/App., p. 23A, fn. 2). Since testimony claiming proof of three consumer credit transactions would not justify a jury finding that Schwartz was a "creditor," Redic's misrepresenting the evidence is to no avail.

That the trial judge applied Redic's "documents speak for themselves" theory at trial is shown in his March 9,

1984 "Memorandum of Decision and Omnibus Order." After referring to his aforementioned January 20, 1984 order, he specifically "found" that: "By the time the trial was over, plaintiff had fully and convincingly proved all of the facts set out in that January 20 order." R/App., p. 9A.

II. The Reversal By The Fourth Circuit Was Based Upon Redic's Failure To Offer Evidence At Trial To Establish Her Case Under North Carolina Law Rather Than Because Of Any "Credibility Disputes" Between The Fourth Circuit And The Jury.

Redic argues in her petition, commencing on page 14, that the Fourth Circuit improperly resolved "credibility disputes" that should have been left to the jury. She asserts that the Court of Appeals held that the jury was required to believe direct evidence from both parties to a particular transaction that their intent was to sell the property even though Redic had furnished circumstantial evidence to support a contrary finding. The only "circumstantial evidence" offered by Redic at trial was the aforementioned *en masse pro forma* introduction of the documents evidencing the 12 relevant transactions. Redic's counsel and the trial judge embraced this theory that these documents somehow "spoke for themselves" and apparently "that they spoke falsely" when compared with the plain meaning of their language. The portion of the opinion referred to on Petition page 24a fails to support Redic's contentions.

The decision of the Fourth Circuit clearly was based upon the trial judge's misconception and misapplication of applicable North Carolina law. This Court has long

held that district courts *must* apply applicable state law and may not select portions with which they agree and ignore the rest. Even Courts of Appeals may not establish rules of law or policy for the State of North Carolina, but rather must see that the determination of a trial court is not induced by a clear misconception or misapplication of state law. *Riteway Carriers, supra; Hardware Mut., supra; Ortman v. Smith,* 198 F.2d 123 (8th Cir. 1952), *cert. denied,* 344 U.S. 856, 73 S.Ct. 95, 97 L.Ed. 664. The Fourth Circuit clearly carried out this function and properly found that the trial judge had continually misconceived and misapplied applicable North Carolina law throughout his mishandling of the case below.

It is in this context that the decision explored both the summary judgment and the directed verdict motions. On P/App. pages 9a through the third line at the top of page 11a, the Fourth Circuit notes the submission by defendants of the unrefuted affidavits of the grantors in eight of the twelve relevant transactions. In the last sentence on page 10a, the Court of Appeals makes the point that the documents evidencing the eight transactions corroborated the affidavits of those parties. This disposed of Redic's argument that the "documents spoke for themselves" and thereby offered contrary proof.

The opinion resumes discussion of the summary judgment motion in the first paragraph on page 23a, as is obvious from the observations in footnote 2. However, the analysis regarding the evidence at trial clearly commences with the second sentence on page 24a. Its essence is that since the grantors testifying at trial corroborated Schwartz' trial testimony by their sworn testimony and also attested

to the fact that the documents evidencing the transactions accurately reflected their true nature, the documents *could not* "speak to the contrary." Having the benefit of the entire Record, together with Briefs from both sides, the Fourth Circuit recognized that the only evidence offered by Redic at trial consisted of the testimony of witness Hughes, the deposition of Baron Alexander, and the documents evidencing the twelve relevant transactions which showed on their face that they did not evidence loan transactions and which were unread and unseen by both judge and jury.

The first paragraph on page 25a makes it clear that the Fourth Circuit had examined all of the evidence offered at trial and had concluded that the only reasonable inference therefrom was that Schwartz was not a "creditor" and thus that the District Court erred in denying his motion for directed verdict. In short, plaintiff offered no "circumstantial evidence" in opposition to defendants' motion for summary judgment *or at trial* that would have supported a finding that at least five transactions met the limited exception to the North Carolina parol evidence rule discussed earlier.

Redic cites but misstates the holding of *Ricks* and *McKinley, supra,* in her claim that the intent of *parties who have executed written contracts* must be proved *solely* by objective facts and circumstances outside the deed, inconsistent with the idea of an absolute deed, *and that the parties may not testify concerning their intent.* As shown earlier, the cases cited actually held that the intentions of the parties may not be proved by simple declarations of *parties trying to contradict written contract terms,* but rather by proof of facts and circumstances inconsistent

vith the idea of an absolute purchase. The observation, 'otherwise, the solemnity of deeds would always be exposed to the slippery memory of witnesses," P/App., page 18a, reflects that the parol evidence rule generally precludes parties to written contracts from varying their terms by oral testimony.

Common sense alone would indicate that an individual knows whether he was offered, requested, or obtained a loan or simply sold his property. *Redic personally testified on point at trial.* Further, Redic offered no evidence at trial that would support a finding that any grantor, *including Redic,* was obligated to exercise the repurchase option or that a debtor-creditor relationship existed at the inception of the transactions as required by the North Carolina Limited Exception. In short, the proper application of North Carolina law demonstrated conclusively that Redic had offered no evidence that would warrant denial of Schwartz' motion for a directed verdict.

Redic's claim that the Fourth Circuit held that a district judge must consider as evidence at trial any affidavits introduced in support of a motion for summary judgment demeans the intelligence of the able and learned Circuit Judges of the Fourth Circuit Court of Appeals, who denied rehearing and rehearing *en banc;* the contention is too preposterous to warrant a response. The cases cited by Redic concerning "intent" and "circumstantial evidence" deal with invidious intent and "evil motives" in discrimination cases and are inapplicable to the interpretation of the written agreements in the case at bar. Determination of the true nature of the transactions and the interpretation of the contracts are governed entirely by North Carolina law, but no such state law was cited by Redic.

III. There Are No "Special And Important" Reasons Under Rule 17 That Would Warrant This Court's Granting Redic's Petition For A Writ Of Certiorari.

Rule 17 of the Rules of the Supreme Court of the United States provides that review on writ of *certiorari* "will be granted only when there are special and important reasons therefor." The Rule then lists several reasons that "indicate the character of reasons that will be considered." In *Rice v. Sioux City Memorial Parks Cemetery,* 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955), this Court held on point that *certiorari* should not be granted except in cases involving principles, the settlement of which is important to the public, *as distinguished from that of the parties,* and in cases where there is a real and embarrassing conflict of opinion and authority between courts of appeal.

Since the Fourth Circuit properly applied North Carolina law in its decision, it has not "decided a federal question in a way so as to conflict with a state court of last resort." It, further, was the District Court, not the Court of Appeals, that "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." However, the adverse effects of the trial judge's departures have been properly remedied by the Court of Appeals in its decision.

The Fourth Circuit properly decided a question of great public concern in reversing the rulings of the trial court that would have allowed important legal documents to be interpreted contrary to the plain meaning of their language, thus placing every solemnly executed and re-

corded real estate deed or similarly important contract in jeopardy. Otherwise, this case involved no truly complex facts or legal principles. It has been stated that "Anyone who can count to five can easily determine whether a business or individual is a covered 'creditor' under revised Regulation Z!"

The narrowly limited North Carolina exception to its parol evidence rule is an anomaly. Careful research reveals that no other Circuit Court of Appeals has had to deal with its application; thus no conflict in the circuits could possibly exist.

Redic understandably did not cite or attempt to bring her petition within any portion of this Rule. As has been clearly shown above in respondent's arguments, the "reasons" stated in her petition at pages 11 through 22 are readily recognized as contrived excuses arrived at by distorting the basis of the decision so bitterly attacked. For example, at page 15, she asserts that the Court of Appeals "never questioned the sufficiency of the circumstantial evidence supporting the verdict." She ignores clear contrary statements of the Fourth Circuit: ". . . [T]he evidence conclusively showed that Schwartz was not a 'creditor' within the meaning of the [Truth-in-Lending] Act." P/App., p. 3a. "The only reasonable inference that could be drawn from the evidence was that Schwartz was not a 'creditor' . . . because the evidence conclusively showed that he had not engaged in the requisite number of [consumer credit] real estate transactions . . ." P/App., p. 25a.

Redic impliedly accuses the Circuit Judges of outright ignorance by her unwarranted claim that they based

their decision on the trial judge's failure to consider at trial evidence offered by affidavits in support of a motion for a summary judgment. Petition, p. 20. Zealous advocacy does not encompass willful misrepresentations, and, for this reason alone, independent of the bankruptcy of Redic's contentions, Redic's petition for a writ of *certiorari* should be summarily denied.

Redic "appealed the Fourth Circuit decision to Judge McMillan" before filing her rehearing petition to the Fourth Circuit, and she has petitioned this Court for a writ of certiorari without awaiting the trial judge's "appellate decision." She also has asserted to the trial judge that she is entitled to file still another new trial motion in the district court after the Fourth Circuit has remanded the case to the district court upon this Court's denial of her petition. Redic and her counsel should heed the sage admonition of this Court stated in *FTC v. Minneapolis-Honeywell*, 334 U.S. 206, 249, 73 S.Ct. 245, 97 L.Ed. 245 (1952): ". . . We . . . encourage [parties and their counsel] to take heed of another principle—the principle that litigation must at some definite time be brought to an end." *Redic and her counsel refuse to accept the obvious fact that this definite point was long ago reached in the case at bar.*

———o———

CONCLUSION

For the reasons and upon the authorities herein stated, respondent respectfully submits that the petition for writ of *certiorari* to the United States of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

RALPH C. CLONTZ, JR.
Clontz and Clontz
Attorneys at Law
The Justice Building
225 South McDowell Street
Charlotte, N.C. 28204-2294
(704) 376-0045
Attorney for Respondent

APPENDIX

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-777-M

MABLE A. REDIC,

Plaintiff,

—vs—

GARY H. WATTS REALTY COMPANY; DAVID S. SCHWARTZ and SHIRLEY E. SCHWARTZ,

Defendants.

ORDER

On December 5, 1983, following a two-hour hearing which was conducted on November 28 and 29, 1983, the court entered an order denying all motions of all parties for summary judgment.

On December 30, 1983, counsel for the defendants filed a thirteen-page "MOTION FOR RECONSIDERATION AND REHEARING" (document number 80). Along with that motion he filed a thirty-seven page "AFFIDAVIT OF RALPH C. CLONTZ, JR. IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND REHEARING."

Leaving aside the personal attacks made in these and other papers upon the court and upon counsel for the plaintiff, the gist of the motion appears to be that defendants' counsel did not get to talk long enough, and that the court should have resolved disputed questions of fact on the motion for summary judgment and should have decided all

issues in favor of all the defendants and dismissed the case.

The December 5, 1983 hearing was not a trial on the merits; it was a hearing on a motion, under Rule 56 of the Federal Rules of Civil Procedure, for *summary judgment* in favor of all defendants.

The practice of this court without regard to the personality of counsel is to start summary judgment hearings by looking at the file and asking questions of counsel and attempting to discover if there is any substantial evidence in the file which, taken at face value, would entitle the party opposing the motion to prevail, assuming that evidence for this purpose to be true.

The court followed that practice in this case.

Since the file, mostly generated by the defendants, was at least six inches thick, I asked counsel opposing defendants' motion to point out the evidence in the file which would support a recovery for the plaintiff.

Counsel did just that.

That evidence, briefly summarized, will support findings in outline form as follows:

1. In 1974 the plaintiff bought the house in which she was living. The mortgage payments on the thirty-year mortgage were $172.00 a month.

2. Plaintiff got behind in her payments. In December, 1981, the house was advertised for sale under a proceedings for foreclosure of the mortgage.

3. Plaintiff applied for a loan to save the property from foreclosure, and was unable to get it from several lending institutions.

4. Several people approached her seeking to purchase the equity in her property.

5. Plaintiff was not interested in selling the house.

6. Defendant Schwartz visited plaintiff's residence and left a Watts Realty Company "flyer" (Redic Deposition, Exhibit D) which, among other conspicuous advertisements, said "All types of financing available when buying."

7. Schwartz talked with plaintiff at her house where he offered to make her a loan.

8. Subsequently, plaintiff executed a number of documents, all dated December 23, 1981, which were, in form, as follows:

> (a) A deed from Mable A. Redic conveying the house to "DAVID S. SCHWARTZ, AND GARY H. WATTS REALTY COMPANY, A NORTH CAROLINA CORPORATION."
>
> (b) A lease by "DAVID SWARTZ REALTY COMPANY, AGENTS" to Mable A. Redic for twelve months at $244.00 a month. The lease was witnessed by "Dave Swartz, agent, AGENT, DAVE SWARTZ REALTY COMPANY." That lease contained the following stipulation: "Tennents [sic] are responsible for all normal household maintenance, including minor plumbing, heating and electric work. Tennents [sic] agree to maintain outside of premises including shubbery [sic], lawns, etc. . . . ."
>
> (c) An "OPTION TO PURCHASE REAL ESTATE," Not assignable by plaintiff, which was signed by "David S. Schwartz"; by "Shirley E. Schwartz," wife of David; by "Gary H. Watts" ("GARY H. WATTS REALTY CO. by Agent"); and by "Mable A. Redic."

[The above paragraphs are based on the deposition of Mable A. Redic, taken by defendants' counsel at his office

at an unstated date in 1983, and verified by the Notary Public-Reporter on August 8, 1983.]

9. Schwartz offered plaintiff a loan.

10. Plaintiff, not the defendants, bore the burden of maintaining the property during the period she has occupied the house since that transaction took place.

11. The purchase option required the plaintiff to pay to Gary H. Watts Realty Co. and David S. Schwartz the sum of $3,600.00 in cash, with interest at 16%, in order to exercise the purchase option, which had to be exercised, if at all, within twelve months, that is, by December 22, 1982. Otherwise, the option was to be void.

12. The value of the house was estimated at the time as $18,500.00 to $20,000.00. The total amount advanced to the plaintiff was $773.66, which came from the Gary Watts Rental Account, and was dated December 23, 1981. This check was marked "For Payment In Full for any and all Equity" which plaintiff had in the house and lot.

13. The plaintiff was in dire financial straits when this transaction took place.

14. The plaintiff thought she was getting a loan.

15. Plaintiff was unable to pay the $3,600.00, and defaulted in the payments due.

16. Defendants brought a foreclosure proceedings and plaintiff filed this suit alleging that the transaction violated the Truth in Lending Act.

17. By affidavits and documents relating to similar transactions, the plaintiff offered evidence that this was not an isolated nor an uncommon transaction, and plaintiff's proof supports a finding that Gary H. Watts Realty and David Schwartz are regular extenders of "credit" and are therefore "creditors" under 15 U.S.C. § 1602(f) and appropriate Regulation Z. Those transactions involved the following persons:

James L. Gillespie; Willie Dean Jackson; Edith M. Hughes; Baron S. Alexander; Benjamin F. Hood; Ernest Drayton; Lillie Mae Smith; Lonnie S. Springs; Willie R. Rinehardt; John Watts; Roosevelt Jackson; and Wheeler Perry.

In some of those transactions, Mrs. Schwartz also appears as a signatory on some of the papers because of her marital status with defendant Schwartz.

18. Gary H. Watts Realty Company and David S. Schwartz are both abundantly shown by this evidence to have been participants in the transaction involving the plaintiff and in other transactions, sufficient to make both of them "creditors" or "extenders of credit."

19. The third defendant, Shirley E. Schwartz, is one of the three signers of the option to purchase, and is a necessary party for purposes of relief, if the plaintiff is entitled to any relief.

The above is merely what some of the evidence shows. It will support a finding that the transactions in question were in substance, though not in form, a loan; that Schwartz and Watts are "extenders of credit"; that the property was a residence and that these were "residential mortgage" transactions under § 1602(w). It will also support a finding that the transactions involved a "credit sale."

It was the judgment of the court, after having reviewed the foregoing information, that it would support a finding in favor of the plaintiff if believed by the trier of fact.

Counsel for defendants argued for probably two-thirds or three-fourths of the time of the two-hour hearing. His principal arguments were addressed to credibility of evidence and credibility of witnesses. Since that was not the issue at that stage of the proceedings, I ultimately advised counsel that questions of credibility would be resolved at the trial, and went ahead and made a ruling with which he is obviously distressed.

I continue to be of the opinion that the motions for summary judgment were correctly denied; that there are genuine disputes as to material facts; and that the case should be tried on the merits as soon as it is reached in its normal order.

The motion for reconsideration and reversal of the previous order is DENIED.

IT IS SO ORDERED, this 19 day of January, 1984.

/s/ James B. McMillan
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-777-M

MABLE A. REDIC,

Plaintiff,

—vs—

GARY H. WATTS REALTY COMPANY, DAVID S. SCHWARTZ and SHIRLEY E. SCHWARTZ,

Defendants.

MEMORANDUM OF DECISION AND OMNIBUS ORDER

This case was tried before a jury on January 26, 27 and 30, 1984. Issues were submitted to the jury and answered as follows:

1. Did the transaction between plaintiff, Mable A. Redic, and defendants David S. Schwartz and Gary H. Watts Realty Company, in December, 1981 (in spite of its formal appearance of being a sale, a lease

back and an option to repurchase) amount, in substance, to an extension of consumer credit secured by a deed of trust on plaintiff's residence?

ANSWER: YES

2. Was the defendant David S. Schwartz a "creditor" at that time?

ANSWER: YES

3. If you have answered issue number 1 "Yes," and if you have answered issue number 2 "Yes," what is the amount, if any, of the finance charge which was imposed in that transaction?

ANSWER: $1572.00

4. Did David S. Schwartz or Gary H. Watts Realty Company charge the plaintiff interest in excess of the lawful rate?

ANSWER: (a) As to Schwartz YES

(b) As to Watts [marked through by jury]

[The court accepts the markings on the issue sheet, attached, as a "No" answer as to defendant Watts.]

5. If you have answered issue number 4 "Yes," what dollar amount of interest did plaintiff pay?

ANSWER: $972.00

Numerous motions were thereafter filed. With respect to those,

IT IS ORDERED:

1. Defendants' "Motion for Reconsideration and Rehearing," *document number 93,* filed February 3, 1984, is DENIED.

2. Plaintiff's motion for award of attorney's fees, *document number 95,* filed February 9, 1984, is ALLOWED. Those fees will be awarded in a separate order.

3. Plaintiff's motion, *document number 113,* filed February 21, 1984, to have certain transfers of realty by defendant Schwartz [which were made three days after the verdict] declared fraudulent will not be decided now. Counsel will bring this matter to the attention of the court after judgment is entered, and if the judgment has not been paid within seven (7) days from its entry.

4. Plaintiff's motion, *document number 116,* filed February 21, 1984, to conduct discovery regarding attorneys' fees, is ALLOWED. The volume of paper filed by defendants' counsel (for example, 339 pages since the verdict was received on January 30, 1984) has a bearing on the reasonableness of the amount of labor required of plaintiff's counsel by that activity.

5. Defendants' "Amendment to Motion for Reconsideration and Rehearing," filed February 22, 1984, *document number 117,* is DENIED.

6. Defendants' "Motion for a Protective Order" prohibiting the taking of depositions by the plaintiff to establish the claim of fraudulent transfer, *document number 118,* filed February 22, 1984, is OVERRULED. However, since action on the question of fraudulent transfers is being postponed by the order with regard to document number 113, above, this motion is temporarily moot.

7. Plaintiff's motion, *document number 120,* filed February 27, 1984, to have Caymet Properties, Ltd., held in contempt is held in abeyance for the time being along with items 113, 117 and 118.

8. Plaintiff's motion, *document number 121,* filed February 27, 1984, for sanctions against David and Shir-

ley Schwartz will also be held in abeyance. See entry as to document 113, above.

9. Defendants have filed no formal motion to set aside the verdict and for a new trial, but the arguments that could be made on such motion are contained in substance in several of the foregoing motions, and IT IS ORDERED that the verdict will not be set aside nor a new trial ordered.

On January 20, 1984, an order (*document number 82*) was entered denying defendants' motion for summary judgment. That order summarized the evidence which was already in the record of the court, before trial, which showed that the motion should be denied. By the time the trial was over, plaintiff had fully and convincingly proved all of the facts set out in that January 20 order. It was the opinion of the court then that this evidence, if believed by the jury, would entitle the plaintiff to the relief sought from Schwartz. As to Watts Realty Company, the evidence of Watts clearly showed Schwartz to be a partner with Watts in his transactions with plaintiff and several others; and although Watts is not technically a "creditor" and therefore is not subject to the Truth-in-Lending Act, plaintiff is entitled by the verdict to recover her house under conditions which impose no monetary loss upon Watts but which require him to give up the property.

The motion (*document number 61*) of Ralph C. Clontz, Jr., counsel for the defendants, for an "Investigation and Hearing" of his charges against Louis L. Lesesne, Jr., for possible tampering with witnesses and suborning perjury is DENIED. The gist of that motion is that Lesesne and Clontz, each *ex parte*, had procured affidavits on different

occasions from the same witnesses who had been involved in transactions with Schwartz; that these affidavits contradicted each other in various particulars; that some of the affiants had said unkind words about Mr. Lesesne; and that Lesesne should be investigated for tampering with witnesses and suborning perjury.

[The witness called by plaintiff who partially repudiated his affidavit in open court testified that the affidavit *did* correctly set out *what he had told* Mr. Lesesne.]

It of course embarrasses a lawyer when a witness repudiates a sworn affidavit, but without more than is shown here it does not call for "investigation and hearing" of the conduct of the lawyer.

If any "investigation and hearing" is called for, it would seem unfair to exclude Mr. Clontz. In his "Motion for Summary Judgment" filed on April 21, 1983, *document number 11,* Mr. Clontz attached an affidavit of an attorney, Kenneth W. Parsons, which had been drawn by Clontz and signed by Parsons. A photocopy of that affidavit is attached to this order. It goes into great detail about what the affidavit said was a personal conference between Parsons and a witness named Edith M. Hughes, who had conveyed her house to Schwartz and Watts on November 23, 1981. At the trial the grantor, Ms. Hughes, testified that she signed the deed on the previous day in the living room of her house and that nobody but Ms. Hughes and Schwartz were present.

Parsons, later called as a witness, admitted that the affidavit tendered by Mr. Clontz was false in all material particulars. On the attached copy of the affidavit there are underlined the parts (some of them at least) which on

cross-examination by the plaintiff Parsons admitted to be untrue.

Glass houses are poor places from which to throw stones.

As a near-full-time courtroom lawyer for more than twenty years, I continue to respect the time-honored privilege of a lawyer to call the judge whatever kind of miscreant suits the lawyer's fancy while the heat of battle and the ire of disappointment are fresh upon him. I also respect the right of lawyers to form their own fantasies about the alleged role of law clerks in the functioning of the federal trial and appellate courts of the land. However, I will make no further comment, because it would divert time and attention from my duty as a judge, which is to try to give fair treatment to all litigants, including Mr. Clontz's clients.

An appropriate judgment will be entered.

This 9 day of March, 1984.

/s/ James B. McMillan
United States District Judge

(Attachment omitted)

STATE OF NORTH CAROLINA)
) AFFIDAVIT
COUNTY OF MECKLENBURG)

LONNIE S. SPRINGS personally appeared before the undersigned Notary Public on the date indicated below and, after having been duly sworn according to law, did depose and state as follows:

1. This sworn statement is being given voluntarily and without any reward or promise of reward.

2. On April 5, 1981, Lonnie S. Springs and Emogene B. Springs sold all of their equity in their home at 4377 Knollcrest Drive, Charlotte, Mecklenburg County, North Carolina to David S. Schwartz and wife, Shirley E. Schwartz. On that same date, they executed a Deed transferring ownership of their property to Mr. and Mrs. Schwartz.

3. Also on April 5, 1981, Lonnie S. Springs and Emogene B. Springs rented the property they had sold to Mr. and Mrs. Schwartz from them for a period of twelve months at a monthly rental of $285.

4. Also on April 5, 1981, David S. Schwartz and Shirley E. Schwartz gave Lonnie S. Springs and Emogene B. Springs an option to re-purchase the property. However, Lonnie S. Springs and Emogene B. Springs never took advantage of their Option to Re-purchase the Property. They have rented the property from Mr. Schwartz ever since April 5, 1981 and they signed a new lease on

January 1, 1983 with David Schwartz Realty Company, Agent, for an additional period of twenty-four months, the monthly rental remaining as $290.00 per month. The Option to Purchase the Real Estate was cancelled because Lonnie S. Springs and Emogene B. Springs did not want to exercise it.

5. Lonnie S. Springs and Emogene B. Springs have never asked for nor obtained any loan from David S. Schwartz and/or Shirley E. Schwartz. They have known since April 5, 1981 that they had sold their property absolutely to David S. Schwartz and Shirley E. Schwartz that they were not obligated to re-purchase the property from Mr. and Mrs. Schwartz at any time.

/s/ Lonnie S. Springs (SEAL)
Affiant

Subscribed to and sworn before me, this 22nd day of March, 1983, at which time the Affiant who signed the first page of this Affidavit acknowledged to me that they were stating the above facts under oath voluntarily and without coercion and also without any promise of reward:

/s/ Melissa Parrish (Hogan)
Notary Public

My Commission Expires: 5-19-85

STATE OF NORTH CAROLINA)
) AFFIDAVIT
COUNTY OF MECKLENBURG)

JAMES L. GILLESPI and MARY S. STOWE personally appeared before the undersigned Notary Public on

the date indicated below and, after having been duly sworn according to law, did depose and state as follows:

1. This sworn statement is being given voluntarily and without any reward or promise of reward.

2. On September 10, 1981, James L. Gillespi and Mary S. Stowe sold all of their equity in their home at 4212 Anita Court, Charlotte, Mecklenburg County, North Carolina to David S. Schwartz. On that same date, James L. Gillespi and Mary S. Stowe executed a Deed transferring ownership of their property to David S. Schwartz.

3. Also on September 10, 1981, James L. Gillespi and Mary S. Stowe rented the property they had sold to Mr. Schwartz from him for a period of one year at a monthly rental of $295.00.

4. Also on September 10, 1981, David S. Schwartz gave James L. Gillespi and Mary S. Stowe an option to re-purchase the property. However, James L. Gillespi and Mary S. Stowe never took advantage of their Option to Re-purchase the Property. The Option to Purchase the Real Estate was cancelled because James L. Gillespi and Mary S. Stowe did not want to exercise it.

5. James L. Gillespi and Mary S. Stowe have never asked for nor obtained any loan from David S. Schwartz. They have known since September 10, 1981 that they had absolutely sold their property to David S. Schwartz and that they were not obligated to re-purchase the property from David S. Schwartz at any time.

/s/ James L. Gillespi (SEAL)
Affiant

/s/ Mary S. Stowe (SEAL)
Affiant

Subscribed to and sworn before me, this 18th day of March, 1983, at which time the Affiants who signed the first page of this Affidavit acknowledged to me that they

were stating the above facts under oath voluntarily and without coercion and also without any promise of reward:

/s/ Melissa Parrish (Hogan)
Notary Public

My Commission Expires: 5-19-85

STATE OF NORTH CAROLINA)
) AFFIDAVIT
COUNTY OF MECKLENBURG)

ERNEST DRAYTON and LORETTA DRAYTON personally appeared before the undersigned Notary Public on the date indicated below and, after having been duly sworn according to law, did depose and state as follows:

1. This sworn statement is being given voluntarily and without any reward or promise of reward.

2. On August 18, 1981, Ernest Drayton and Loretta Drayton sold all of their equity in their home at 1010 Tracy Drive, Charlotte, Mecklenburg County, North Carolina to David S. Schwartz and Shirley E. Schwartz. On that same date, Ernest Drayton and Loretta Drayton executed a Deed transferring ownership of their property to David S. Schwartz and Wife, Shirley E. Schwartz.

3. Also on August 18, 1981, Ernest Drayton and Loretta Drayton rented the property they had sold to Mr. and Mrs. Schwartz from them for a period of two years at a monthly rental of $370.00.

4. Also on August 18, 1981, David S. Schwartz and Shirley E. Schwartz gave Ernest Drayton and Loretta Drayton an option to re-purchase the property. However, Ernest Drayton and Loretta Drayton never took advantage of their Option to Re-purchase the Property. They have rented the property from Mr. and Mrs. Schwartz ever since August 18, 1981 and they executed a new lease on January 15, 1983 with David Schwartz Realty Com-

pany, Agent, for an additional period of two years and thereafter on a month to month rental basis with a monthly rental of $385.00 per month. The Option to Purchase the Real Estate was cancelled because Mr. and Mrs. Drayton did not want to exercise it.

5. Ernest Drayton and Loretta Drayton have never asked for nor obtained any loan from David S. Schwartz and/or Shirley E. Schwartz. They have known since August 18, 1981 that they had sold their property absolutely to Mr. and Mrs. Schwartz and that they were not obligated to re-purchase the property from Mr. and Mrs. Schwartz at any time.

/s/ Ernest Drayton (SEAL)
Affiant

/s/ Loretta F. Drayton (SEAL)
Affiant

Subscribed to and sworn before me, this 21st day of March, 1983, at which time the Affiants who signed the first page of this Affidavit acknowledged to me that they were stating the above facts under oath voluntarily and without coercion and also without any promise of reward:

/s/ Kenneth Parsons
Notary Public

My Commission Expires: November 15, 1987

STATE OF NORTH CAROLINA)
) AFFIDAVIT
COUNTY OF MECKLENBURG)

ROSEVELT JACKSON and CAROLYN JACKSON personally appeared before the undersigned Notary Public on the date indicated below and, after having been duly sworn according to law, did depose and state as follows:

1. This sworn statement is being given voluntarily and without any reward or promise of reward.

2. On April 27, 1981, Rosevelt Jackson and Carolyn Jackson sold all of their equity in their home at 3946 Barlowe Road, Charlotte, Mecklenburg County, North Carolina to David S. Schwartz and Shirley Schwartz. On that same date, Rosevelt Jackson and Wife, Carolyn Jackson executed a Deed transferring ownership of their property to David S. Schwartz and Wife, Shirley E. Schwartz.

3. Also on April 27, 1981, Rosevelt Jackson and Carolyn Jackson rented the property they had sold to Mr. and Mrs. Schwartz from them for a period of six months at a monthly rental payment of $285.00.

4. Also on April 27, 1981, David S. Schwartz and Shirley E. Schwartz gave Rosevelt Jackson and Carolyn Jackson an option to re-purchase the property. However, Rosevelt Jackson and Carolyn Jackson never took advantage of their Option to Re-purchase the Property. They have rented the property from the Schwartzs ever since April 27, 1981 and signed a new lease on January 1, 1983 with David Schwartz Realty Company for an additional period of six months, the monthly rental remaining as $285.00 per month. The Option to Purchase the Real Estate was cancelled because Rosevelt Jackson and Carolyn Jackson did not want to exercise it.

5. Rosevelt Jackson and Carolyn Jackson have never asked for nor obtained any loan from David S. Schwartz and Shirley E. Schwartz. They have known since April 27, 1981 that they had sold their property absolutely to David S. Schwartz and Shirley E. Schwartz and that they were not obligated to re-purchase the property from David S. Schwartz and Shirley Schwartz at any time.

/s/ Rosevelt Jackson (SEAL)
Affiant

/s/ Carolyn Jackson (SEAL)
Affiant

Subscribed to and sworn before me, this 18th day of March, 1983, at which time the Affiants who signed the first page of this Affidavit acknowledged to me that they were stating the above facts under oath voluntarily and without coercion and also without any promise of reward:

/s/ Melissa Parrish (Hogan)
Notary Public

My Commission Expires: 5-19-85

STATE OF NORTH CAROLINA)
) AFFIDAVIT
COUNTY OF MECKLENBURG)

JOHN WATTS, JR. and BRENDA WATTS personally appeared before the undersigned Notary Public on the date indicated below and, after having been duly sworn according to law, did depose and state as follows:

1. This sworn statement is being given voluntarily and without any reward or promise of reward.

2. On November 11, 1981, John Watts, Jr. and Brenda Watts sold all of their equity in their home at 4639 Hidden Valley Road, Charlotte, Mecklenburg County, North Carolina to David S. Schwartz. On that same date, John Watts and Wife, Brenda Watts executed a Deed transferring ownership of their property to David S. Schwartz.

3. Also on November 11, 1981, John Watts, Jr. and Brenda Watts rented the property they had sold to Mr. Schwartz from him for a period of six months at a monthly rental of $285.00.

4. Also on November 11, 1981, David S. Schwartz and Shirley E. Schwartz gave John Watts, Jr. and Brenda Watts an option to re-purchase the property. However, John Watts, Jr. and Brenda Watts never took advantage of their Option to Re-purchase the Property. They have

rented the property from Mr. Schwartz ever since November 11, 1981 and signed a new lease on January 1, 1983 for an additional period of six months, the monthly rental being $325.00 per month. The Option to Purchase the Real Estate was cancelled because John Watts, Jr. and Brenda Watts did not want to exercise it.

5. John Watts, Jr. and Brenda Watts have never asked for nor obtained any loan from David S. Schwartz and/or Shirley E. Schwartz. They have known since November 11, 1981 that they had absolutely sold their property to David S. Schwartz and that they were not obligated to re-purchase the property from David S. Schwartz at any time.

/s/ John Watts, Jr. (SEAL)
Affiant

/s/ Brenda Watts (SEAL)
Affiant

Subscribed to and sworn before me, this 17th day of March, 1983, at which time the Affiants who signed the first page of this Affidavit acknowledged to me that they were stating the above facts under oath voluntarily and without coercion and also without any promise of reward:

/s/ Melissa Parrish (Hogan)
Notary Public

My Commission Expires: May 19, 1985

STATE OF NORTH CAROLINA)
) AFFIDAVIT
COUNTY OF MECKLENBURG)

WILLIE RAY RINEHARDT and VIRGINIA M. RINEHARDT personally appeared before the undersigned Notary Public on the date indicated below and, after hav-

ing been duly sworn according to law, did depose and state as follows:

1. This sworn statement is being given voluntarily and without any reward or promise of reward.

2. On April 9, 1981, Willie Ray Rinehardt and Virginia M. Rinehardt sold all of their equity in their home at 917 Yuma Street, Charlotte, Mecklenbrug County, North Carolina to David S. Schwartz and Shirley E. Schwartz. On that same date, they executed a Deed transferring ownership of their property to David S. Schwartz and Wife, Shirley E. Schwartz.

3. Also on April 9, 1981, Willie Ray Rinehardt and Virginia M. Rinehardt rented the property they had sold Mr. and Mrs. Schwartz for a period of twelve months at a monthly rental of $350.00.

4. Subsequently, on June 1, 1982, David S. Schwartz and Shirley E. Schwartz gave Willie Ray Rinehardt and Virginia M. Rinehardt an option to re-purchase the property. However, Willie Ray Rinehardt and Virginia M. Rinehardt never took advantage of their Option to Repurchase the Property. They have rented the property from Mr. and Mrs. Schwartz ever since April 9, 1981 and they signed a new lease on January 1, 1983 with David S. Schwartz, Agent, for an additional period of two years, the monthly rental remaining as $350.00 per month. The Option to Purchase the Real Estate was cancelled because Willie Ray Rinehardt and Virginia M. Rinehardt did not want to exercise it.

5. Willie Ray Rinehardt and Virginia M. Rinehardt have never asked for nor obtained any loan from David S. Schwartz and/or Shirley E. Schwartz. They have known since April 9, 1981 that they had sold their property absolutely to David S. Schwartz and Shirley E. Schwartz and that they were not obligated to re-purchase the property from Mr. and Mrs. Schwartz at any time.

/s/ Willie Ray Rinehardt (SEAL)
Affiant

/s/ Virginia M. Rinehardt (SEAL)
Affiant

Subscribed to and sworn before me, this 18th day of March, 1983, at which time the Affiants who signed the first page of this Affidavit acknowledged to me that they were stating the above facts under oath voluntarily and without coercion and also without any promise of reward:

/s/ Melissa Parrish (Hogan)
Notary Public

My Commission Expires: 5-19-85

STATE OF NORTH CAROLINA)
) AFFIDAVIT
COUNTY OF MECKLENBURG)

LILLIE M. SMITH and HAROLD T. SMITH personally appeared before the undersigned Notary Public on the date indicated below and, after having been duly sworn according to law, did depose and state as follows:

1. This sworn statement is being given voluntarily and without any reward or promise of reward.

2. On July 29, 1981, Lillie M. Smith and Harold T. Smith sold all of their equity in their home at 9826 Garthwood Drive, Charlotte, Mecklenburg County, North Carolina to David S. Schwartz. On that same date, Lillie M. Smith and Harold T. Smith executed a Deed transferring ownership of their property to David S. Schwartz.

3. Also on July 29, 1981, Lillie M. Smith and Harold T. Smith rented the property they had sold to Mr. Schwartz from him for a period of twelve months at a monthly rental of $275.

4. Also on July 29, 1981, David S. Schwartz and Shirley E. Schwartz gave Lillie M. Smith and Harold T. Smith an option to re-purchase the property. However, Lillie M. Smith and Harold T. Smith never took advantage of their Option to Re-purchase the Property. They have

rented the property from Mr. Schwartz ever since July 29, 1981 and Lillie M. Smith signed a new lease on January 1, 1983 with David S. Schwartz, Agent, for an additional period of twenty-four months, the monthly rental remaining as $275.00 per month. The Option to Purchase the Real Estate was cancelled because Lillie M. Smith and Harold T. Smith did not want to exercise it.

5. Lillie M. Smith and Harold T. Smith have never asked for nor obtained any loan from David S. Schwartz and/or Shirley E. Schwartz. They have known since July 29, 1981 that they had sold their property absolutely to David S. Schwartz and that they were not obligated to re-purchase the property from David S. Schwartz at any time.

/s/ Lillie M. Smith (SEAL)
Affiant

/s/ Harold T. Smith (SEAL)
Affiant

Subscribed to and sworn before me, this 18th day of March, 1983, at which time the Affiants who signed the first page of this Affidavit acknowledged to me that they were stating the above facts under oath voluntarily and without coercion and also without any promise of reward:

/s/ Melissa Parrish (Hogan)
Notary Public

My Commission Expires: 5-19-85

STATE OF NORTH CAROLINA)
) AFFIDAVIT
COUNTY OF MECKLENBURG)

CARL M. BEATTY and DEBRA H. BEATTY personally appeared before the undersigned Notary Public on the date indicated below and, after having been duly sworn according to law, did depose and state as follows:

1. This sworn statement is being given voluntarily and without any reward or promise of reward.

2. On August 15, 1981, Carl M. Beatty and Debra H. Beatty sold all of their equity in their home at 2715 Phillips Avenue, Charlotte, Mecklenburg County, North Carolina to David S. Schwartz and Shirley E. Schwartz. On that same date, they executed a Deed transferring ownership of their property to David S. Schwartz and wife, Shirley E. Schwartz.

3. Also on August 15, 1981, Carl M. Beatty and Debra H. Beatty rented the property they had sold to Mr. and Mrs. Schwartz from them for a period of two years at a monthly rental of $250.00.

4. Also on August 15, 1981, David S. Schwartz and Shirley E. Schwartz gave Carl M. Beatty and Debra H. Beatty an option to re-purchase the property. However, Carl M. Beatty and Debra H Beatty have never exercised their Option to Re-purchase the Property to date. They further understand that they are not in any way obligated to exercise that option.

5. Carl M. Beatty and Debra H. Beatty have never asked for nor obtained any loan from David S. Schwartz and/or Shirley E. Schwartz. They have known since August 15, 1981 that they had sold their property absolutely to Mr. and Mrs. Schwartz and that they were not obligated to re-purchase the property from Mr. and Mrs. Schwartz at any time.

/s/ Carl M. Beatty (SEAL)
Affiant

/s/ Debra H. Beatty (SEAL)
Affiant

Subscribed to and sworn before me, this 23rd day of March, 1983, at which time the Affiants who signed the first page of this Affidavit acknowledged to me that they

were stating the above facts under oath voluntarily and without coercion and also without any promise of reward:

/s/ Melissa Parrish (Hogan)
Notary Public

My Commission Expires: 5-19-85

STATE OF NORTH CAROLINA)
) AFFIDAVIT
COUNTY OF MECKLENBURG)

WHEELER C. PERRY and LOUISE C. PERRY personally appeared before the undersigned Notary Public on the date indicated below and, after having been duly sworn according to law, did depose and state as follows:

1. This sworn statement is being given voluntarily and without any reward or promise of reward.

2. On April 11, 1981, Wheeler C. Perry and Louise C. Perry sold all of their equity in their home at 1016 Rosada Court, Charlotte, Mecklenburg County, North Carolina to David S. Schwartz and Shirley E. Schwartz. On that same date, they executed a Deed transferring ownership of their property to Mr. and Mrs. Schwartz.

3. Also on April 11, 1981, Wheeler C. Perry and Louise C. Perry rented the property they had sold to Mr. and Mrs. Schwartz from them for a period of twelve months at a monthly rental of $370.

4. Also on April 11, 1981, David S. Schwartz and Shirley E. Schwartz gave Wheeler C. Perry and Louise C. Perry an option to re-purchase the property. However, Wheeler C. Perry and Louise C. Perry never took advantage of their Option to Re-purchase the Property. The Option to Purchase the Real Estate was cancelled because Wheeler C. Perry and Louise C. Perry did not want to exercise it.

5. Wheeler C. Perry and Louise C. Perry have never asked for nor obtained any loan from David S. Schwartz and/or Shirley E. Schwartz. They have known since April 11, 1981 that they had sold their property absolutely to Mr. and Mrs. Schwartz and that they were not obligated to re-purchase the property from Mr. and Mrs. Schwartz at any time.

/s/ Wheeler C. Perry (SEAL)
Affiant

/s/ Louise C. Perry (SEAL)
Affiant

Subscribed to and sworn before me, this 23rd day of March, 1983, at which time Affiants who signed the first page of this Affidavit acknowledged to me that they were stating the above facts under oath voluntarily and without coercion and also without any promise of reward:

/s/ Melissa Parrish (Hogan)
Notary Public

My Commission Expires: 5-19-85

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
C-C-82-0777-M

MABLE A. REDIC,

Plaintiff

vs.

GARY H. WATTS REALTY COMPANY,
DAVID S. SCHWARTZ and
SHIRLEY E. SCHWARTZ,

Defendants

Filed in Support of Defendants' Motion for
Summary Judgment

DEFENDANTS' FIRST REQUEST FOR ADMISSION OF GENUINENESS OF DOCUMENTS AND OF FACTS

TO: Louise L. Lesesne, Jr., Esquire, Gillespie and Lesesne, Attorneys at Law, Attorneys for Plaintiff Mable A. Redic

The Plaintiff will take notice that the Defendants in the above entitled action request the Plaintiff, within 30 days of the service hereof, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

• • •

2. That each of the following statements is true:

A. Plaintiff signed and verified the pleadings ("ORIGINAL PETITION, PLAN AND CHAPTER III STATEMENT") a two page excerpt of which is appended hereto as the first two pages in "EXHIBIT D-1," and her attorney filed them on her behalf in Wage Earner Plan # CB-76-0567 in the Bankruptcy Court in the Charlotte Division of the United States District Court for the Western District of North Carolina on September 17, 1976.

B. The Plaintiff received a copy of the "ORDER CONFIRMING PLAN," which is the fourth page in appended "EXHIBIT D-1," prior to the day in December, 1981, when she first s p o k e with Defendant David S. Schwartz concerning her property.

C. The Plaintiff understood on December 23, 1981 that she had been ordered by the above "ORDER

CONFIRMING PLAN" not to incur any indebtedness during the period of the aforementioned Wage Earner Plan # CB-76-6567 and during any extensions thereof.

D. Plaintiff was told by the attorney represnting her in the above Wage Earner Plan essentially that she was prohibited from obtaining any loans or incurring any indebtedness so long as she remained in the Wage Earner Plan.

• • •

F. Plaintiff remained in the above Wage Earner Plan continuously from September 17, 1976 until August 2, 1982.

G. On or about January 3, 1979, Robert M. Burroughs, then Standing Trustee for Wage Earner Plans, mailed to Plaintiff and Plaintiff received a notice denominated a "FOURTH WARNING" (a copy of which "notice" is appended hereto as "EXHIBIT D-12") and that notified Plaintiff that she had not been making payments as she had agreed to do, that her last payment received under the above Wage Earner Plan was received on November 30, 1979, and that only eight payments had been made by her under said Plan throughout the year 1978.

H. On April 23, 1979, the U.S. Bankruptcy Judge, by Trustee Mary Catherine Holcomb, entered an "ORDER TO EMPLOYER TO PAY TO THE TRUSTEE" in the above Wage Earner Plan, a copy of which is appended as the fifth page of "EXHIBIT D-1," whereby Plaintiff's employer was ordered to deduct from Plaintiff's earnings each month the sum of $260 and to mail such deducted amount to the Trustee named therein.

• • •

J. On December 1, 1981, Special Proceeding Number 81-SP-2125 was filed in the Mecklenburg County Superior Court wherein the Trustee in a Deed of Trust executed by Plaintiff moved for foreclosure of said Deed of Trust because of Plaintiff's default in making her payments on the debt secured by said Deed of Trust and further sought to sell Plaintiff's property located at 827 Woodside Avenue, Charlotte, North Carolina at public auction and to apply the net sale proceeds toward payment of Plaintiff's secured debt. A copy of the pleadings in this Special Proceeding was served personally on Plaintiff by a Mecklenburg County, North Carolina Deputy Sheriff on December 9, 1981.

* * *

M. In the period from December 1 through December 22, 1981, Plaintiff was contacted by a Mr. Richard W. Stikeleather of "Windbluff Investments" who sought to purchase her equity in the property being foreclosed upon.

* * *

P. In the period from December 1, 1981 until December 22, 1981, Plaintiff was contacted by one or more persons interested in purchasing her said property in addition to Messrs. Pressley and Stikeleather and either of the Defendants in the above entitled action.

* * *

U. Plaintiff never applied to Defendant Shirley S. Schwartz for a loan at any time, never met her and never had any dealings with her whatsoever.

* * *

X. Plaintiff was never offered a loan by Defendant Shirley E. Schwartz at any time.

* * *

Z. Plaintiff signed the Contract of Sale, appended hereto as "EXHIBIT D-2," on December 23, 1981.

AA. Plaintiff signed the Real Estate Deed, appended hereto as "EXHIBIT D-3," in the presence of the Notary Public listed thereon on December 23, 1981.

BB. Plaintiff delivered the said Real Estate Deed to Defendants David S. Schwartz and Gary H. Watts Realty Company on December 23, 1981 after she had signed it.

CC. Plaintiff knew that the Deed she signed on December 23, 1981 transferred title to her property described therein to Defendants David S. Schwartz and Gary H. Watts Realty Company.

DD. Plaintiff was furnished a copy of the "Closing Statement" appended hereto as "EXHIBIT D-4" on December 23, 1981, and she signed the same on page 2 thereof.

EE. Plaintiff received the check dated December 23, 1981, which is appended hereto as "EXHIBIT D-5," from one of the Defendants, and she endorsed and negotiated said check.

FF. Plaintiff signed the Lease Agreement, which is appended as "EXHIBIT D-5," on December 23, 1981.

GG. Plaintiff made 12 monthly payments of $244 each to Defendant David S. Schwartz after she executed the above Lease.

HH. Plaintiff wrote on the face of each of the above 12 checks for $244 the indication that the check was for "RENT."

* * *

JJ. The checks appearing on appended "EXHIBIT D-9" were mailed or given by her to Defendant David S. Schwartz on the dates shown thereon and were returned by Plaintiff's bank because of insufficient funds in Plaintiff's checking account on which said checks were drawn.

* * *

LL. During both March and October, 1982 respectively, Plaintiff was served with Magistrate's Summonses and Complaints in Summary Ejectment by a Deputy Sheriff of Mecklenburg County, North Carolina whereby Defendant David S. Schwartz sought to evict her from the premises described in the above Lease because of her alleged default in making rental payments under the above Lease.

MM. In neither of the above Summary Eviction proceedings did Plaintiff tell the Magistrate, the Deputy Sheriff serving the process on her, or anyone else that she was not leasing the property in question from Defendants David S. Schwartz and Gary H. Watts Realty Company or assert that she was the owner thereof.

NN. In each of the above Summary Eviction proceedings, Plaintiff was not evicted because she made arrangements with said Defendant Schwartz to bring her rental payments current.

OO. Plaintiff signed the "Option to Purchase Real Estate" that is appended as "EXHIBIT D-7" on De-

cember 23, 1981 and received a copy thereof that same date.

PP. Plaintiff telephoned Defendant David S. Schwartz during December of 1982 and requested said Defendant to allow her one week's time within which to "make good" a worthless check in the amount of $244 she had given him.

QQ. On the above occasion, Plaintiff requested Defendant David S. Schwartz to allow her an extension of her time within which she might exercise her option to purchase the property she was occupying under the terms of the Option appended hereto as "EXHIBIT D-7," but said Defendant denied her said request.

RR. On the above occasion, Plaintiff told said Defendant that she was expecting to obtain a loan "within a couple months" thereafter that would enable her to exercise her option to purchase the property.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
C-C-82-0777-M

MABLE A. REDIC,

Plaintiff

vs.

GARY H. WATTS REALTY COMPANY, et al.,

Defendants

Filed In Support Of Defendants' Motion For Summary Judgment

PLAINTIFF'S RESPONSES TO DEFENDANTS' FIRST REQUEST FOR ADMISSIONS

Pursuant to Rule 36, F.R.Civ.P., for the purpose of this action only and without acknowledging the admissibility or relevance of any of the information contained therein, plaintiff responds to the Defendants' First Request for Admission of Genuineness of Documents and of Facts as follows:

* * *

2. With regard to each request contained in paragraph 2, plaintiff responds as follows:

A. Admitted.

B. Admitted.

C. Admitted.

D. Denied. Plaintiff was told by her attorney not to incur any indebtedness without notifying the trustee.

* * *

F. Admitted that the order closing the case was dated August 2, 1982.

G. Admitted.

H. Admitted.

* * *

J. Admitted.

M. Admitted.

* * *

P. Admitted.

* * *

U. Admitted.

* * *

X. Admitted.

* * *

Z. Admitted.

AA. Admitted.

BB. Admitted.

CC. Admitted.

DD. Admitted.

EE. Admitted.

FF. Admitted.

GG. Admitted.

HH. Admitted.

* * *

JJ. Admitted.

* * *

LL. Admitted.

MM. Admitted.

NN. Admitted.

OO. Admitted.

PP. Admitted.

QQ. Admitted.

RR. Admitted.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-82-0777-M

MABLE A. REDIC,

Plaintiff,

vs.

GARY H. WATTS REALTY COMPANY, et al.,

Defendants.

AFFIDAVIT OF JAMES L. GILLESPI

Personally appeared before me James L. Gillespi, who, being first duly sworn, states:

1. My name is James L. Gillespi. I live at 429 Lambeth Drive, Apt. 9, Charlotte, N.C. 28213.

2. I was formerly the owner, along with Mary S. Stowe, of a house and lot located in Mecklenburg County at 4212 Anita Court, Charlotte, N.C.

3. During 1981, I got behind in my payments to the mortgage company which held the note on my house, and the mortgage company began foreclosure proceedings.

4. I was contacted by David Schwartz, who offered to lend me enough money to get my mortgage payments caught up. Under the terms of the agreement, Mary Stowe and I had one year in which to pay him back the money that he had lent us. It was always understood by me that the transaction represented a loan from Mr. Schwartz and his wife to Mary Stowe and me.

5. Although the papers that I signed called the transaction a sale, with a lease and option to purchase, it was

not in fact a sale. I did not even receive any money at the closing in September 1981. It is my opinion that the value of the house at that time was substantially more than what Mr. Schwartz and his wife paid.

6. I continued to live in the house for a year after the loan was made. At the end of the year, I was unable to repay the money Mr. Schwartz had lent me, and I had to move from the house.

7. In March 1983, I received a call from Mr. Schwartz. He persuaded me to come to his office by telling me that he wanted to give me a key to a house that he was going to give me a good deal on. When I got there, he instead told me to sign an affidavit which he had already prepared. He told me that the purpose of the affidavit was simply to show that I no longer had any interest in the house at 4212 Anita Court. I did not read the affidavit carefully. I signed the affidavit and was given a copy. Later that night, after I read it over, I realized that I had been tricked into signing something that was not true.

/s/ James L. Gillespi

Sworn to and subscribed before me
on this the 13th day of May, 1983.

/s/ Elizabeth N. Atkins
Notary Public

My Commission Expires: May 12, 1986

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-82-0777-M

MABLE A. REDIC,

Plaintiff,

vs.

GARY H. WATTS REALTY COMPANY, et al.,

Defendants.

AFFIDAVIT OF WILLIE DEAN JACKSON

Personally appeared before me Willie Dean Jackson, who, being first duly sworn, states:

1. My name is Willie Dean Jackson.

2. I, along with Brenda Jackson, was formerly the owner of a house and lot located at 3339 Barfield Drive, Charlotte, N.C., being described as Lot 6 in Block 6 of Clanton Park, as shown in a map recorded in Map Book 8 at Page 47 in the Office of the Register of Deeds for Mecklenburg County, North Carolina.

3. In March 1981, I was behind in my mortgage payments, because I had lost my job. The mortgage company was about to foreclose on the deed of trust. At that time, I was approached by David Schwartz, who told me that he was going to help me out by saving my credit rating.

4. In order to save my house, my wife and I entered into a transaction with Mr. Schwartz and his wife, Shirley E. Schwartz, on March 23, 1981, in which we executed a deed to Mr. and Mrs. Schwartz, and he and his wife simultaneously signed a lease agreement and a separate option to repurchase. Under those documents, we were entitled to remain in possession of the house and to "repurchase" it at the end of a year. The repurchase price was to be the then-current fair market value of the prop-

erty. I was also to make monthly "rent" payments of $350.00. This amount exceeded the monthly mortgage payments by nearly $100.00.

5. At the time that I executed these documents, I was under financial duress and was hard pressed for money because of the pending foreclosure action.

6. I was allowed to remain in possession of the house for over a year after I executed these documents.

7. It is my opinion that the price at which Mr. and Mrs. Schwartz bought the property was substantially less than what the property was then worth. In fact, we were paid only $100.00 for our entire equity in the property. In my opinion, we had equity of several thousand dollars above the amount of the outstanding note.

8. It was my intent and desire to save my house, and I entered into this transaction with Mr. and Mrs. Schwartz only because I understood it to be a loan, such that, upon repayment of the loan, I would be able to retain my home.

/s/ Willie Dean Jackson

Sworn to and subscribed before me
on this the — day of May, 1983.

_____

Notary Public

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-82-0777-M

MABLE A. REDIC,

Plaintiff,

vs.

GARY H. WATTS REALTY COMPANY, et al.,

Defendants.

AFFIDAVIT OF EDITH M. HUGHES

Personally appeared before me Edith M. Hughes, who, being first duly sworn, states:

1. My name is Edith M. Hughes. I live at 700 Woodruff Place, Charlotte, N.C. 28208.

2. In November 1981, I was the owner of a house and lot located in Mecklenburg County at 2408 Lanecrest Drive, Charlotte, N.C. I had gotten behind in my mortgage payments to the company that held the note for my house, and the mortgage company had begun foreclosure proceedings.

3. I was contacted by David Schwartz, who, along with Gary H. Watts Realty Co., offered to lend me enough money to get my mortgage payments caught up. Under the terms of the agreement, I had one year in which to pay back Mr. Schwartz and Gary H. Watts Realty Co. the money that they lent me. It was always understood by me that the transaction was a loan.

4. Although the papers that I signed called the transaction a sale, with a lease and option to purchase, it was not in fact a sale. It was instead a loan of enough money for me to get my mortgage caught up. I received only $120.73 at the closing on November 23, 1981. It is my opinion that the value of the house at that time was substantially more than what Mr. Schwartz paid.

5. I continued to live in the house for a year after the loan was made. I was ultimately unable to repay the money Mr. Schwartz and Gary H. Watts Realty Company had lent me, and they had me evicted from the house, even though Mr. Schwartz had told me that he was not going to do it.

/s/ Edith M. Hughes

Sworn to and subscribed before me
on this the — day of May, 1983.

Notary Public

My Commission Expires:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-82-0777-M

MABLE A. REDIC,

Plaintiff,

vs.

GARY H. WATTS REALTY COMPANY, et al.,

Defendants.

AFFIDAVIT OF BARON S. ALEXANDER

Personally appeared before me Baron S. Alexander, who, being first duly sworn, states:

1. My name is Baron S. Alexander. In October 1981, I, along with Pamela S. Alexander, owned a house and lot located in Mecklenburg County at 1817 Patton Avenue, Charlotte, N.C.

2. In October 1981, payments to the mortgage company which held the first mortgage on the house had gotten behind, and the mortgage company was beginning foreclosure proceedings. I was approached by David S. Schwartz, who offered to lend me the money to get the loan account up to date. Mr. Schwartz told me that he was not licensed to make a loan and that for that reason he could not call the transaction a loan.

3. Instead, I signed a deed to Mr. Schwartz, along with David D. Malphurs, Sr. They then agreed to lease the property back to me for one year, and executed an option under which I could repurchase the property at the end of the one-year period.

4. Although the transaction was described as a sale, with a lease and option to repurchase, it was always my understanding that the transaction was a loan.

5. It is my opinion that the house was at that time worth considerably more than what Mr. Schwartz and Mr. Malphurs paid for it. I realized only approximately $700.00 from the transaction after the mortgage payments were made.

6. I continued to occupy the house for several months after this transaction.

/s/ Baron S. Alexander

Sworn to and subscribed before me
on this the 13th day of July 1983.

/s/ C. M. Freed (SEAL)
Notary Public

My Commission Expires: 7/1/86

(In the following affidavit—pp. 41a through partial 56a—the affiant initialed each page and two handwritten corrections.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
C-C-82-0777-M

MABLE A. REDIC,

Plaintiff,

vs.

GARY H. WATTS REALTY COMPANY, DAVID S. SCHWARTZ and SHIRLEY E. SCHWARTZ,

Defendants.

SUPPLEMENTAL AFFIDAVIT OF
JAMES L. GILLESPI
IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

JAMES L. GILLESPI personally appeared before the undersigned Notary Public on the date indicated below and, after having been duly sworn according to law, did depose and state as follows:

1. I personally know about everything I say and swear to in this Affidavit, and I swear it is all true.

2. I am giving this sworn statement voluntarily and have not received or been promised any money or reward of any sort for giving it. I also am not being forced to give this Affidavit by threats or any other pressure except that my honesty forces me to tell the whole truth in this sworn statement. I do not now rent any property from David S. Schwartz or from Gary H. Watts Realty Company, and I don't have any business dealings with either of them now.

3. I now live in Apartment 9, 429 Lambeth Drive, Charlotte, N.C. 28213. I am in business for myself in cement finishing. I went to school through the 12th grade, and I read and write — I can read and understand all except "big words."

4. I had a discussion with Attorney Ralph C. Clontz, Jr. for more than an hour on Friday, September 9, 1983. Mr. David S. Schwartz carried me down to his lawyer's office.

5. Mr. Clontz explained to me that, even though he was the attorney for David S. Schwartz and for Gary H. Watts Realty Company, he was also an "officer of the court." This meant that he had to be sure that everything he filed in court was completely true. He also told me that he tried to live by the "Golden Rule" and thus had to be 100% fair to Attorney Louis L. Lesesne who is also an officer of the court and that he had to try to be sure that I was telling the whole truth about my dealings with Attorney Lesesne and the different papers I had signed.

6. Until Mr. Clontz explained it, I knew generally that an "Affidavit" was something you swore to, but I learned from him and know now that my signing an "Affidavit" is the same thing as if I were sworn on the Bible in Court before the Judge and testified on the witness stand. Before signing this Affidavit, the Notary Public had me place my left hand on the Bible and swear that everything in this Affidavit was true and correct to my personal knowledge, and I do swear that it is all true and correct.

7. Mr. Clontz also explained to me what "Perjury" was. I now understand that "Perjury" means saying any-

thing under oath or signing any statement under oath that I know is not the truth. I understand that "Perjury" covers written Affidavits as strongly as it covers swearing on a witness stand in court. He explained to me that it is a serious crime to give any sworn statement, including this Affidavit, that is not 100% true.

8. If I am asked to, I will be glad to testify under oath in court to the facts I am giving in this Affidavit.

9. Mr. Clontz first had me read the Affidavit Mary S. Stowe and I signed before the Notary Public on March 18, 1983, which shows that it was filed in the U.S. District Court on April 21, 1983. (To save time, I will call this "my Original Affidavit" when I talk about it in the rest of this Affidavit.) After I had read my Original Affidavit, Mr. Clontz read each word of my Original Affidavit to me and asked me to tell him whether the things we said in each paragraph were true or false. Since every word in each paragraph of my Original Affidavit is the truth, I told Mr. Clontz that. As I told him, I knew that I was signing a sworn statement when I signed my Original Affidavit in front of the Notary Public in some lawyer's office on March 18, 1983.

10. Mr. Clontz then showed me a two page statement I had signed on May 13, 1983 in Attorney Lesesne's law office. (To save time, I will call this two page statement "my Lesesne Statement" when I talk about it in the rest of this Affidavit.) As I'll explain later, I didn't know that my Lesesne Statement was a sworn statement or an "Affidavit" when I signed it even though Mr. Clontz showed me that it says "AFFIDAVIT OF JAMES L. GILLESPI" near the top of the paper. Since Mr. Clontz asked me to, I

read every word of all seven paragraphs on both pages of my Lesesne Statement very carefully. After I had got through reading it, Mr. Clontz asked me whether the things on those two pages were true or false. I told him then and I swear now that "most of the stuff in there is completely not so!"

TRUTH OR FALSITY OF EACH PARAGRAPH OF MY LESESNE STATEMENT

11. Mr. Clontz then read each word of each of the seven paragraphs of my Lesesne Statement to me, one at a time, asking me what parts were true and what parts were false. My answer to Mr. Clontz, which was and still is the honest truth, was:

A. What it said in Paragraph 1 is true, since it does give my right name and my present address.

B. What it said in Paragraph 2 is true, since Mary S. Stowe and I did once own a house and lot at 4212 Anita Court, here in Charlotte.

C. What it said in Paragraph 3 is true as far as it goes. We did get behind in our payments on our house mortgage in 1981, and the mortgage company did start foreclosing on my house. However, that isn't all of the true story, and I will tell the rest of it later in this Affidavit.

D. Paragraph 4 in my Lesesne Statement says:

> "4. I was contacted by David Schwartz, who offered to lend me enough money to get my mortgage payments caught up. Under the terms of the agreement, Mary Stowe and I had one year in which to pay him back the money that he had

> lent us. It was always understood by me that the transaction represented a loan from Mr. Schwartz and his wife to Mary Stowe and me."

All of that paragraph up above is not so and is what Attorney Lesesne said to me on the telephone — not what I told him. David Schwartz offered to buy our home and rent it back to us for a year. He also gave us 12 months to buy the house back if we wanted to. I knew we didn't have to buy it back. He never offered to lend us any money — I wish he would! There never was any agreement for us to "pay anything back" and I never thought I had a loan from Mr. Schwartz. I knew what our deal was and still do. I told all this to Attorney Lesesne when I talked to him on the telephone. Mr. Lesesne told me "that the law was that the option to buy the home back was a loan." I'll give the full story of our dealings with Mr. Schwartz and my dealings with Mr. Lesesne later in this Affidavit.

E. Paragraph 5 in my Lesesne Statement says:

> "5. Although the papers I signed called the transaction a sale, with a lease and option to purchase, it was not in fact a sale. I did not even receive any money at the closing in September 1981. It is my opinion that the value of the house at that time was substantially more than what Mr. Schwartz and his wife paid."

Most of what is said in the paragraph up above is not so. The only true thing stated in the paragraph is that we "didn't get any money at the closing." As I will explain later, we never were supposed to. I knew that we were making a sale to Mr. Schwartz, and we got a fair deal in the sale. The other things said in the paragraph up above are things Mr. Lesesne said to me on the telephone — not what I said to him!

F. Paragraph 6 in my Lesesne Statement says:

> "6. I continued to live in the house for a year after the loan was made. At the end of the year, I was unable to repay the money Mr. Schwartz had lent me, and I had to move from the house."

Most of what was said in the paragraph up above is not so, and I never told Mr. Lesesne that it was that way. We did live in the house we sold to Mr. Schwartz and then rented back from him for about a year. However, I moved out of the house on my own and for personal reasons that had nothing to do with Mr. Schwartz. I moved out because I wanted to and not because Mr. Schwartz ever asked or forced me to. I swear again that I never told Mr. Lesesne that Mr. Schawtrz "lent me" or Mary Stowe anything. I will explain everything else later in this Affidavit.

G. Paragraph 7 in my Lesesne Statement says:

> "7. In March 1983, I received a call from Mr. Schwartz. He persuaded me to come to his office by telling me that he wanted to give me a key to a house that he was going to give me a good deal on. When I got there, he instead told me to sign an affidavit which he had already prepared. He told me that the purpose of the affidavit was to show that I no longer had any interest in the house at 4212 Anita Court. I did not read the affidavit carefully. I signed the affidavit and was given a copy. Later that night, after I read it over, I realized that I had been tricked into signing something that was not true."

Most of what is said in that paragraph up above is not so. It says things that Mr. Lesesne said to me, and he tried to "put words into my mouth." Ever since I moved out of the house at 4212 Anita Court, I have been talking with

Mr. Schwartz from time to time about buying a house from him. During March of this year, Mr. Schwartz called me and asked me to come to his office. He said he had found a house I might like and also that he had something for me to sign. He did show me the house, but I didn't like it. When I got there on March 18, 1983, Mr. Schwartz gave me my Original Affidavit and asked me to read it over carefully. He said that if everything in there was the truth, he wanted me to swear to it in front of a Notary Public at a lawyer's office near Mr. Schwartz's office. I read it very carefully and understood what it said, and I knew that everything in there was the truth. When Mr. Schwartz carried me over to the Notary Public, I signed my Original Affidavit in front of her. I was given a copy of my Original Affidavit to take home with me. I never told Attorney Lesesne that I had been tricked by David Schwartz into signing something that was not true or the other things he put in the paragraph up above.

MY DEALINGS WITH ATTORNEY LOUIS L. LESESNE

12. I will now tell all about the conversations and dealings I had with Attorney Louis L. Lesesne. I have to admit I can't remember everything he said to me and everything I said to him, but I am going to tell the truth as I best remember it:

A. I ignored two different letters I received from Mr. Lesesne. He later called me, and I talked to him three times on the telephone before the one time I met him in person. He asked me if I had sold Mr. Swartz my house, and I told him that I had. He told me that he had some lady that David Schwartz had taken her house from and that he needed a statement to straighten out the facts. I told him that I already gave David Schwartz a statement

that was the complete truth about the dealings between me and Mr. Schwartz. Mr. Lesesne said he knew that, but that he "needed another statement he could use to help the lady out." I didn't have any interest in what he was talking about. I told him that Mary Stowe and I had sold our house to David Schwartz, that David Schwartz had given us a Lease to rent the house, and also that Mr. Schwartz had given us a paper that would let us buy the house back within a year. Mr. Lesesne asked me if David Schwartz had given us an "option" to buy the house back, and I said that he had. Mr. Lesesne told me that the law was that an "option" was the same thing as a "loan."

B. During the whole time we were talking on the telephone, Mr. Lesesne kept saying "Loan Option" about every other word. Whatever I said, he would turn it around and "try to make it something different." He told me that he wanted me to sign a statement that would help his lady out and said that "it would not be in any way a statement against David Schwartz." He kept talking like he was trying to show me how to get my house back, but I guess that was just to get me down to his office. He said that "I and the other lady were in the same boat, but it was no reflection on David Schwartz." I told Mr. Lesesne that David Schwartz had never offered to lend us any money and that we never agreed to pay any money back. I told him that I knew what we had signed and the deal we had made with Mr. Schwartz.

C. Mr. Lesesne kept fast talking at me, and I finally agreed I would help the lady out by signing a statement, but I expected the statement to say the same facts I had sworn to in my Original Affidavit I had signed on March 18, 1983.

D. When I got to Mr. Lesesne's law office on May 13, 1983, he and his secretary were starting out the door on the way home. I had not shown up one other time I had been supposed to go because I really didn't have any interest in the whole mess. When I told Mr. Lesesne who I was, he took me back into his office and he had the two pages I later signed already typed up. I was in his office not more than about 10 or 15 minutes total. He briefly went over the statement — sort of fast read it, but he didn't really explain it. He said it was just "a statement that would help out his lady but wouldn't involve anybody else." I didn't understand that I was really swearing to what was on the paper, and I signed it after just glancing at it. I honestly have to say that he handed me my Lesesne Statement, and I could have read it if I had wanted to; but I didn't have any interest in it because he told me that it was just something to help his lady out and didn't involve anybody else.

I also didn't know then how serious it was to sign an "Affidavit" and didn't know that what I was signing was an "Affidavit." I will never again sign an Affidavit without reading it over carefully and making sure I understand it and that everything it says in it is the whole truth! I did sign it, and his secretary was in the room when I signed it, but Mr. Lesesne never gave me a copy. Based on what Mr. Lesesne said to me, I really thought what I signed was just a statement to show that "what happened between me and Mr. Schwartz was different from what happened between Mr. Schwartz and the lady." I told Mr. Lesesne that as long as it didn't affect anyone, I would sign the "statement." I feel that I was unfairly tricked into signing my Lesesne Statement by words Mr. Lesesne said to

me on the phone and in his office and the way he kept telling me that an "Option" was the same as a "Loan." I have been very angry at Mr. Lesesne since I carefully read the paper he had me sign and found out that he had me sign something that was not true. I feel sure that he knew it wasn't true — at least that is what I got out of all of our talks. I didn't tell a lie on purpose, and I didn't know that what I was signing was being said under oath.

TRANSACTIONS WITH DAVID SCHWARTZ AND MARY STOWE AND ME

13. Here is the whole story of what Mary Stowe and I had to do with the property and our deals with Mr. David Schwartz:

A. In January of 1981, our home was put in foreclosure by Lumbermen's Investment Corporation because we hadn't been making our house payments. Shortly after this, I was approached by Mr. Schwartz who wanted to know if we would be interested in selling him our home. I told him that I thought I would be able to raise the money to get my mortgage payments caught up since I had talked to the mortgage company and they had said I could do it if I agreed to their terms. The mortgage company said Mary Stowe and I would first have to sign a statement that we would not let our house payments get behind again and that if we did, we would not be able to work out things again to keep the house. I got up the money to make up the back payments and signed the statement for the mortgage company. I have fastened to this Affidavit a copy of the Statement Mary Stowe and I signed on February 18, 1981. It is called "EXHIBIT A."

B. Mary Stowe and I got behind on our house payments a second time. We didn't make any payments from the time we signed the Statement with the mortgage company until the mortgage company started a second foreclosure. I wasn't able to make the mortgage payments because of my work and also some "bad domestic problems." I also had a bunch of judgments against me for money I hadn't paid — about $1,500 in total judgments, which were against the house because Mary Stowe and I were not married.

C. After the second foreclosure got started, David Schwartz came by and asked if we would like to sell our home to him. Because I knew I couldn't bring my payments current and because of the court judgments against me, I was interested this time. Many other real estate people like Mr. Schwartz came out and tried to buy my house, but neither Mr. Schwartz nor any of them was willing to pay me any money because of the back payments and big mortgage we owed and the judgments against me. Many of these other real estate men offered to let us lease the house back and some would give us a chance to repurchase the property if we could. We decided to sell our home to David Schwartz since we knew him from the last time. His offer was about the same as the others except that he seemed to "tell it like it was better."

D. Mr. Schwartz said that he would buy our home and also was willing to rent it back to us under a written Lease for one year at what I knew was a fair monthly rent payment. He also said he would be willing to give us a one year option to buy the home back if we decided we wanted to buy it within the year.

I knew then that we were not obliged ever to buy it back. He made it clear that we would be selling the property to him absolutely and that our only dealings would be that of a landlord and tenant if we accepted his offer. The rent we finally agreed on was $295.00 a month, but he let us pay it twice a month at $147.50 each payment because that suited us better.

E. When you know about all the court judgments I had against me, you can see that David Schwartz dealt honestly and fairly with us.

F. When we went to close the deal, we went to a lawyer's office. The lawyer that handled it explained every paper to us before we signed it, and he made it clear that we were selling our house, that we were getting a lease on the property and that we had an option to buy the property back if we wanted to within one year. He also made it clear that we were not getting a loan, and we never thought that we were getting a loan. Mr. Schwartz has never made me a loan, but I sure wish he would!

G. While I was living as a tenant in the house, I got behind in my rent many times. He had to get eviction papers on us a lot, but many times after Mr. Schwartz got court judgments to put us out, he would always let me work out the rent payment and stay in the home. Mr. Schwartz never actually forced us out of the house. As I said earlier, I moved out of the house for personal reasons that had nothing to do with Mr. Schwartz. I never told anyone that I had to move because I could not pay a loan to Mr. Schwartz or anyone else! I also want to say that all of my dealings were with Mr. Schwartz. I never dealt with or even saw Mrs. Schwartz. Neither Mary Stowe

nor I ever wanted to buy the house back, and that is why we didn't use our Option.

14. I have read every word of this Affidavit, and Mr. Clontz also read every word of it to me in front of the Notary Public to make certain that he had got what I said written down right. Everything I have said in this Affidavit is the honest sworn truth the same as if I was on a witness stand in court. I have sworn to everything in this Affidavit with my hand on the Bible.

/s/ James L. Gillespi (SEAL)
JAMES L. GILLESPI, Affiant

Sworn to and subscribed before me, this the 15th day of September, 1983.

/s/ Lenora B. McGee
LENORA B. McGEE, Notary Public

My Commission Expires: March 10, 1985

(Exhibit omitted)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
C-C-82-0777-M

MABLE A. REDIC

Plaintiff

vs.

GARY H. WATTS REALTY COMPANY
DAVID S. SCHWARTZ
SHIRLEY E. SCHWARTZ

Defendants

AFFIDAVIT OF
WILLIE D. JACKSON
IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGEMENT

WILLIE D. JACKSON personally appeared before the undersigned Notary Public on the date indicated below, and having been duly sworn according to law, did depose and state as follows:

1. All of the facts stated in this Affidavit are true to my personal knowledge.

2. This sworn statement is being given voluntarily and without any reward or promise of reward, and with full understanding of the meaning and penalty of perjury.

3. In February 1981, I learned that my home was in foreclosure, and was to be sold at auction by the Lomas & Nettleton Company for non-payment of my mortgage with them. At that time, I was also in default on my second mortgage with the General Electric Company. I owed them approximately Seven Thousand Dollars.

4. I knew I was about one and one-half years behind on my payments on my first mortgage and in default on my second mortgage, I decided to sell my home, if possible. I listed my home for sale with the PRENATT REALTY COMPANY, and hoped that a buyer would be found before the sale date. I also talked with Mr. Rick Toms of Toms Realty Company about selling my home, but he could not do anything for me due to the large second mortgage on my home. I owed over Thirty Two Thousand Dollars on my home.

5. Mr. David S. Schwartz contacted me about buying my home, and I informed him of the amount owed and that I wished to sell it. Mr. Schwartz stated "That he could not buy it under those conditions as I owed more than

it was worth, and would wait until it went through foreclosure to see if he wanted to buy it, and if he could talk to General Electric Credit about their second mortgage." I did not have much hope of selling my home due to the large amount owed on it. At the foreclosure sale there were no bidders for the property, and the bid was assigned to the mortgage company. I was informed of this by the attorney and by the Real-Estate company trying to sell my home. I was completely packed ready to move when Mr. Schwartz told me that he might purchase the home if he could assume the present mortgage instead of paying the new high interest rate. I stated to him "I would like for him to buy the home and I would be willing to do anything necessary for him to be able to assume the present loan. He informed me that he would pay the General Electric Company to clear their obligation if he was allowed to assume loan. He offered to lease the property to me for a period of one year, and should I want to buy the home, and obtain my own financing for it, he would sell it to me for the appraised value made by an F.H.A. or V.A. appraiser. He made it very clear that I was under no obligation to buy it at any time.

6. I knew absolutely that I sold my home to DAVID S. SCHWARTZ, Et Al. That I was not obligated to repurchase this property from David Schwartz at any time. I knew my entire relationship with David Schwartz was a tenant and landlord relationship.

7. At no time did I ask DAVID S. SCHWARTZ for a loan of any type nor at any time did DAVID S. SCHWARTZ, GARY H. WATTS REALTY COMPANY OR SHIRLEY E. SCHWARTZ make any offer of a loan of any type. All of my dealings were with David S. Schwartz, soley.

8. In any conversation with any party contacting me regarding my dealings with DAVID S. SCHWARTZ, ET AL, I have stated the facts contained herein are true and correct.

This the 16 day of July, 1983

/s/ Willie D. Jackson
WILLIE D. JACKSON, Affiant

Subscribed and sworn before me, this 16 day of July, 1983, at which time the Affiant who signed this sworn statement acknowledged to me that he was stating the facts under oath voluntarily and without coercion and also without any promise or reward.

/s/ James J. Delgany
NOTARY PUBLIC

My Commission Expires: May 8, 1984

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-82-0777-M

MABLE A. REDIC

Plaintiff

vs.

GARY H. WATTS REALTY COMPANY,
DAVID S. SCHWARTZ and
SHIRLEY E. SCHWARTZ,

Defendants

DEFENDANTS' SECOND
REQUEST FOR ADMISSION OF
GENUINENESS OF DOCUMENTS
AND OF FACTS

TO: Louis L. Lesesne, Jr., Esquire, Gillespie and Lesesne, Attorneys at Law, Attorneys for Plaintiff Mable A. Redic.

The Plaintiff will take notice that the Defendants in the above entitled action request the Plaintiff, within 30 days of the service hereof, to make the following admissions for the purpose of this action and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That the following document, a copy of which is attached to this request, is genuine:

The document, a copy of which is appended hereto as "EXHIBIT D-13," consisting of a letter written by Plaintiff's counsel to Mr. Roosevelt Jackson and Ms. Carolyn Jackson on March 31, 1983.

GILLESPIE & LESESNE
Attorneys at Law
960 Johnston Building
Charlotte, North Carolina 28281

March 31, 1983

Donald S. Gillespie, Jr.
Louis L. Lesesne, Jr.
Telephone
(704) 372-5700

Mr. Roosevelt Jackson
Ms. Carolyn Jackson
3946 Barlowe Rd.
Charlotte N.C. 28208

Dear Mr. and Mrs. Jackson:

I represent a lady in a claim against David Schwartz. While my client's home was in danger of being foreclosed, Mr. Schwartz entered into a transaction in which he took a deed to her house with a lease and an option to repurchase.

Based on information which we have received, you were involved in a similar type of transaction with Mr. Schwartz. It would be helpful to my client if I could talk with you briefly about the circumstances of the transaction with Mr. Schwartz. Would you please call me at the above number, or at my home, 333-9537?

This incident does not involve you in any way, and you will not be involving yourself in this case by speaking with me. I will not tell anyone that you have even spoken with me unless you agree to it, or unless a court should require it.

Sincerely yours,
/s/ Louis L. Lesesne, Jr.

LLLjr:bna

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-82-0777-M

MABLE A. REDIC,

Plaintiff,

vs.

GARY H. WATTS REALTY COMPANY, et al.,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' SECOND REQUEST FOR ADMISSIONS

While reserving all claims as to the relevance, competence or admissibility of the following, plaintiff responds to the defendants' Second Request for Admission of Genuineness of Documents and Facts as follows:

1. That the following document, a copy of which is attached to this request, is genuine.

The document, a copy of which is appended hereto as "EXHIBIT D-13," consisting of a letter written by Plaintiff's counsel to Mr. Roosevelt Jackson and Ms. Carolyn Jackson on March 31, 1983.

RESPONSE: Admitted.

2. That each of the following statements is true:

A. On or about March 31, 1983, Plaintiff's Attorney of Record, Louis L. Lesesne, Jr., mailed or caused to be mailed a certain letter addressed to Mr. Roosevelt Jackson and Ms. Carolyn Jackson a copy of which letter is appended hereto as "EXHIBIT D-13."

RESPONSE: Admitted.

B. During 1982 or 1983, Plaintiff's counsel sent or had sent a letter similar in content to appended "EXHIBIT D-13" to Mr. Lonnie S. Springs, who had entered into a transaction or transactions with defendant David S. Schwartz and Shirley E. Schwartz on or about April 5, 1981.

RESPONSE: Admitted.

C. During 1982 or 1983, Plaintiff's counsel sent or had sent a letter similar in contents to appended "EXHIBIT D-13'' to James L. Gillespi, who had entered into a transaction or transactions with Defendant David S. Schwartz on or about September 10, 1981.

RESPONSE: Admitted.

D. During 1982 or 1983, Plaintiff's counsel sent or had sent a letter similar in content to appended "EXHIBIT D-13" to Ernest Drayton and/or Loretta Drayton, who had entered into a transaction or transactions with De-

fendants David S. Schwartz and Shirley E. Schwartz on or about August 18, 1981.

RESPONSE: Admitted.

E. During 1982 or 1983, Plaintiff's counsel sent or had sent a letter similar in content to appended "EXHIBIT D-13" to John Watts, Jr. and/or Brenda Watts, who had entered into a transaction or transactions with Defendant David S. Schwartz on or about November 11, 1981.

RESPONSE: Admitted.

F. During 1982 or 1983, Plaintiff's counsel sent or had sent a letter similar in content to appended "EXHIBIT D-13" to Willie Ray Rinehardt and/or Virginia M. Rinehardt, who had entered into a transaction or transactions with Defendants David S. Schwartz and Shirley E. Schwartz on or about April 9, 1981.

RESPONSE: Admitted.

G. During 1982 or 1983, Plaintiff's counsel sent or had sent a letter similar in content to appended "EXHIBIT D-13" to Lillie M. Smith and/or Harold T. Smith, who had entered into a transaction or transactions with Defendant David S. Schwartz on or about July 29, 1981.

RESPONSE: Admitted.

H. During 1982 or 1983, Plaintiff's counsel sent or had sent a letter similar in content to appended "EXHIBIT D-13" to Carl M. Beatty and/or Debra H. Beatty, who had entered into a transaction or transactions with Defendants David S. Schwartz and Shirley E. Schwartz on or about August 15, 1981.

RESPONSE: Admitted.

I. During 1982 or 1983, Plaintiff's counsel sent or had sent a letter similar in content to appended "EXHIBIT D-13" to Wheeler C. Perry and/or Louise C. Perry, who had entered into a transaction or transactions with Defendants David S. Schwartz and Shirley E. Schwartz on or about April 11, 1981.

RESPONSE: Admitted.

J. During 1982 or 1983, Plaintiff's counsel sent or had sent a letter similar in content to appended "EXHIBIT D-13" to Willie Dean Jackson, who had entered into a transaction or transactions with Defendants David S. Schwartz and Shirley E. Schwartz on or about March 21, 1981.

RESPONSE: Admitted.

K. During 1982 or 1983, Plaintiff's counsel sent or had sent a letter similar in content to appended "EXHIBIT D-13" to Benjamin F. Hood, Jr. and/or Ida Pearl Covington Hood, who had entered into a transaction or transactions with Defendants David S. Schwartz and Shirley E. Schwartz on or about August 22, 1981.

RESPONSE: Denied.

L. Sometime during 1982 or 1983, Plaintiff's counsel sent or caused to be sent a letter similar in content to appended "EXHIBIT D-13" to at least one of the Grantors (for whom he was able to obtain a mailing address) named in all Deeds which had been recorded in the Office of the Register of Deeds for Mecklenburg County during the period from January 1, 1980 through December 31, 1981 where the Grantees named in such deeds were either David S. Schwartz or Shirley E. Schwartz or both of them.

RESPONSE: Denied.

M. Sometime during 1982 or 1983, Plaintiff's counsel sent or caused to be sent a letter similar in content to appended "EXHIBIT D-13" to at least one of the Grantors (for whom he was able to obtain a mailing address) named in all Deeds which had been recorded in the Office of the Register of deeds for Mecklenburg County during the period from January 1, 1980 through December 31, 1981 where the Grantees in such deeds were Gary H. Watts Realty Company or Gary H. Watts or both of them.

RESPONSE: Denied.

/s/ Louis L. Lesesne, Jr.
Gillespie & Lesesne
980 Johnston Building
Charlotte, N.C. 28281
704/372-5700
Attorney for Plaintiff

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA

Charlotte Division

C-C-82-777-M

MABLE A. REDIC,

Plaintiff

vs.

GARY H. WATTS REALTY COMPANY;
DAVID S. SCHWARTZ and
SHIRLEY E. SCHWARTZ,

Defendants.

Transcript of Proceedings

November 28, 1983
January 25, 1984

Page 1 of the Trial Transcript states as follows:

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WITNESSES:

Plaintiff —

1. Mable A. Redic . . . .
2. Mildred Ledbettor . . . .
3. Edith Hughes . . . .
4. Phyllis Furr . . . .

Defendant —

1. David S. Schwartz . . . .
2. Carolyn Jackson . . . .
3. Kenneth W. Parsons . . . .
4. Brenda Watts . . . .
5. Lonnie S. Springs . . . .
6. James Gillespie . . . .
7. Gary H. Watts, Jr. . . . .
8. William J. Kellam . . . .
9. Robert L. Lindsey . . . .
10. Marcus Johnson . . . .
11. Wilburn M. Withrow . . . .

EXHIBITS:

Plaintiff —

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4.	Closing Statement 12/23/81 [Involving Plaintiff Redic]	56
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New page —44-A—, inserted in Trial Transcript, reads as follows:

The following should be inserted on page 45 at line 15:

Opening statements were given, after which the following proceedings were had, to wit:

COURT: Is the plaintiff ready to proceed with your testimony?

MR. LESESNE: Before I do that, I would like to hand up a stipulation that the parties signed as to the authenticity of the exhibits. I'd also like to go ahead and

hand up Plaintiff's Exhibits 1 through 78 and move their admission.

COURT: They are all stipulated to be authentic?

MR. LESESNE: Yes, Sir.

COURT: Let them be received in evidence. A stipulation is an agreement by the lawyers that something is so. This batch of papers here, which you eventually will get to see, each of them is agreed to be what on its face it appears to be. All right.

(Continue at Page 45, line 15)

Trial Judge McMillan's characterization of the the "twelve relevant transactions" in his charge to the jury reads as follows:

[From page 413, Lines 9 through 19]

There are also the factors to be considered by you in looking at the other transactions, the other extensions of credit which the evidence shows that the defendant Schwartz made over this period of time. I don't recall the exact number but there were ten or twelve, all told, ten, eleven or twelve. I don't remember the exact number, and your inquiry in each one of these things is not whether that transaction meets all five of these indicia but whether in substance, taking all these factors into account, such transaction was a consumer loan instead of what the papers alone would say, a sale with an agreement to reconvey.

GILLESPIE & LESESNE
ATTORNEYS AT LAW
SUITE 980, UNITED CAROLINA BANK BUILDING
212 SOUTH TRYON STREET
CHARLOTTE, NORTH CAROLINA 28281

DONALD S. GILLESPIE, JR.
LOUIS L. LESESNE, JR.
TELEPHONE (704) 372-5700

May 20, 1985

Mr. Thomas J. McGraw, Clerk
United States District Court
United States Court House
Charlotte, N.C. 28202

Re: Redic v. Gary Watts Realty Co.

C-C-82-0777-M

Dear Mr. McGraw:

Enclosed are original and copy of a motion for a new trial, along with the affidavit of Clyde Virginia Rinehardt I request that the motion be filed.

The file in this case has been forwarded to the Court of Appeals. I am serving the motion on this date, in order to ensure that the motion is served within the 10 day period specified by Rule 59(b), F.R.Civ.P. A judgment was entered in the Court of Appeals on May 9, 1985. I suggest that no action needs to be taken on the motion until the file is returned from the Court of Appeals.

Sincerely Yours,

Louis L. Lesesne, Jr.

Enclosures
cc: Ralph C. Clontz, Jr.

GILLESPIE & LESESNE
ATTORNEYS AT LAW
SUITE 980, UNITED CAROLINA BANK BUILDING
212 SOUTH TRYON STREET
CHARLOTTE, NORTH CAROLINA 28281

DONALD S. GILLESPIE, JR.
LOUIS L. LESESNE, JR.

TELEPHONE (704) 372-5700

July 2, 1985

Mr. Thomas J. McGraw, Clerk
United States District Court
United States Court House
Charlotte, N.C. 28202

Re: Redic vs. Gary H. Watts Realty Co.,
C-C-82-0777-M

Dear Mr. McGraw:

Judge McMillan signed an order which was filed on June 25, 1985, giving the Plaintiff ten (10) days to file a memorandum in support of her motion for a new trial.

I was out of the office three days last week and will also be out of the office three days this week. Further, as you know, we are beginning the *Chisholm* hearings next week.

In view of this, I request that we be given an extension, to July 12, 1985, to file our memorandum. I spoke with Ms. Lipkin today and informed her that I would be making this request.

It may be that the Court will in any event want to defer taking any action on this motion for the time being, as we plan to petition the United States Supreme Court for a writ of certiorari.

Sincerely yours,

Louis L. Lesesne, Jr.

LLLjr/bf
cc: Ralph C. Clontz, Jr.